WORKERS COMP AND MARITIME LIABILITY FOR THE ENERGY INDUSTRY

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Workers Comp and Maritime Liability for the Energy Industry

Contents

Introduction

For most companies, the costs of on-the-job injuries and illnesses are the most significant component of total cost of risk. Much of the cost is driven by state workers compensation laws. However, many energy companies have—or may incur—operations on or near bodies of water, and their obligations to provide compensation for injured workers may stem from federal laws such as the Longshore and Harbor Workers' Compensation Act, the Jones Act, or general maritime law, in addition to traditional workers compensation laws.

The interaction of workers compensation insurance with state and federal workers compensation laws is unique in the insurance industry, and changes in these Acts or the regulations implementing them have profound effects on the insurance line. Additionally, lawsuits related to employee injuries—whether covered by workers compensation or not—continue to grow. Lastly, since this is the most costly property and casualty insurance coverage for most energy industry companies, as well as most other types of businesses, the insurance products and methods of handling this risk have evolved and grown accordingly.

This course—Workers Compensation and Maritime Liability for the Energy Industry—is designed to provide detailed information on workers compensation and employers liability insurance for energy companies. It begins with an introduction to workers compensation (WC), explaining how the law has evolved from the first state act in 1902 to its current status today. Today's state WC laws are examined, including who is covered and under what circumstances.

Next is the workers compensation policy itself. The various parts of the policy are explained in detail, as are the endorsements commonly used to modify the workers compensation policy. This is followed by a brief overview of the workers compensation marketplace—the various ways workers compensation insurance is purchased in the states and alternatives to insurance.

The course then moves to the federal workers compensation and employers liability laws, explaining the history of the law, who is covered, key applicability issues, covered injuries and diseases, benefits, how claims are handled, and how to insure the exposures.

Course Objectives

Students who successfully complete this course will be able to

1. recognize how the workers compensation system evolved and how its laws and regulations apply to the energy industry;
2. recognize the scope of coverage provided under the workers compensation policy and utilize this information to select appropriate recommendations for coverages needed by a given energy industry employer;
3. recognize the effect of various workers compensation endorsements and identify specific coverage enhancements valuable to a given employer;
4. recognize the mechanics of the workers compensation marketplace and identify the options open to a given employer to fulfill the requirements of the workers compensation laws; and
5. recognize energy industry employments that may be subject to federal workers compensation statutes or maritime law and identify ways of insuring those exposures.

Chapter 1
Introduction to Workers Compensation

Chapter Overview and Objectives

Workers compensation insurance is unique in that it is closely tied to the laws of the various states. In order to understand how the workers compensation system works, it is necessary to have a general understanding of workers compensation law. This chapter reviews the evolution of workers compensation law and, in general terms, the operation of the law in the context of the energy industry.

On completion of this chapter, you should be able to

1. recognize the factors that led to the evolution of the current state workers compensation system,
2. distinguish between common law and statutory obligations to compensate injured workers, and
3. recognize how state workers compensation statutes and regulations apply to the energy industry.

While workers compensation benefits are prescribed by state law, several federal statutes, as well as maritime law, also operate to provide benefits to injured workers in many circumstances common to the energy industry. These are discussed in Chapters 5 and 6.

The Evolution of Workers Compensation Law

Before the Industrial Revolution, there was little reason for the development of workers compensation statutes. Sailors were entitled to wages, transportation, maintenance, and cure if they fell sick or were injured in the service of a ship, and they could also bring an action against the ship itself under general maritime law if their illness was caused by the unseaworthiness of the vessel. Injuries to trade workers were infrequent since virtually all of their work was performed slowly and meticulously by hand.

The advent of the Industrial Revolution brought high-speed machinery and mass-production techniques, combined with very poor working conditions. This led to a startling increase in work-related injury, disease, and death. An injured employee's only recourse was to sue the employer based on the employer's failure to meet one or more of its common law obligations to the employee:

1. To provide a safe place to work
2. To provide an employee with a sufficient number of competent fellow employees
3. To provide safe tools and equipment
4. To develop and enforce safety rules
5. To warn employees of inherent work-related dangers of which employees could not reasonably be expected to be aware

In time, a series of common law defenses against such negligent actions developed to the point where it was virtually impossible for an injured employee to win the suit:

- The *assumption of risk* defense stated that an employee who voluntarily entered into a job knowing of the unsafe nature of the premises or the work and who understood the risks inherent in the job could not recover for a resulting injury. For example, a bricklayer might have been denied recovery for a strained back on the grounds that he or she assumed the risk of injury since he or she knew (or at least should have known) that there was a good chance of this type of injury due to the heavy lifting required on the job.

- The *contributory negligence* defense stated that if the employee's negligence somehow contributed to his or her own injury, then the employee was not entitled to recover damages for his or her injury. Therefore, even if the employer's negligence was the major cause of the injury, any negligence on the part of the employee, however slight, prevented the employee from collecting for his or her injuries.
- The *negligence of a fellow employee* defense stated that an employer was not liable for an injury to an employee that resulted solely from the negligence of a fellow employee. This defense rule was an exception to the basic common law doctrine of *respondeat superior* under which an employer was held liable for the negligent acts of its agents or employees.

As if these common law defenses were not enough, the common law in the 1800s stated that only the injured worker had a right to file a suit against the employer. If a worker died from his or her on-the-job injuries, those dependent on that worker, such as his or her family, did not have the right to bring a suit for damages against the employer.

Employers Liability Statutes and Judicial Modifications

By the late 1800s, it became apparent that the system simply was not working. Occupational injuries and deaths were increasing, and many workers and their families were being left destitute or impoverished because of their inability to collect for the negligence of the employer. Public pressure eventually brought about changes in the common law through both statutory and judicial modification.

In many states, the concept of contributory negligence was replaced by the concept of comparative negligence, either through legislative enactment or through court rulings. Under this doctrine, the negligence of an injured employee did not constitute an absolute defense for the employer, but the percentage of the employee's negligence was used to reduce the amount of recovery. For example, an employee who suffered $1,000 in damages but was held to be 20 percent negligent for the injury would receive $800.

In many jurisdictions, the negligence of a fellow employee defense was also modified through the adoption of the vice principal rule and/or the superior-servant rule by the courts. The vice principal rule basically stated that the employer's common law obligations (to provide a safe workplace, safe tools, etc.) were nondelegable duties. Therefore, the employer was responsible for injuries to an employee caused by the negligence of a fellow employee if the fellow employee had been given the responsibility of seeing that these obligations were met. In other words, the employer could not evade its common law obligations by delegating authority to an employee. Similarly, the superior-servant rule stated that the employer was responsible for injuries to workers caused by the negligence of another employee when such an employee had supervisory or directive authority over the injured employee. If a supervisor was negligent in regard to the work-related injury of one of his or her subordinates, the employer was responsible for the injury.

Finally, around the turn of the century, many states began to enact legislation that allowed the dependents of a deceased employee to bring suits for damages against the employer claiming the employer was negligent in the employee's death. This recovery was limited to the actual monetary loss the dependent suffered due to the employee's death. No recovery was allowed for conditions such as mental anguish.

Early Workers Compensation Laws

Although the various employers liability statutes and judicial modifications of common law were an improvement, many legislators were still unhappy with the common law system of compensating injured employees. An employee still had to resort to the courts in order to be compensated for an injury. Many employees did not have the necessary resources to pursue this long and expensive process. While many lawyers would take such cases on a contingency basis, their legal fees often amounted to one-half of any judgment. In addition, this system was of no help to the injured worker who could not prove employer negligence.

While judicial and legislative bodies in the United States were busy trying to improve the common law system of compensating injured employees through the enactment of employers liability statutes and judicial modification, European countries were experimenting with the first workers compensation systems. What made workers compensation law dramatically different from the common law system was that it was a "no-fault" law. When an employee's job and injury were covered by the workers compensation law, the employee was compensated by the employer regardless of whether the employer was negligent. In exchange for this automatic "no-fault" compensation, the employee forfeited the right to bring suit for compensatory damages against the employer.

The common law system of compensating injured employees has not been totally eliminated by the passage of workers compensation laws. The common law system still applies to certain employments that are not covered under workers compensation law. These employments are discussed later in this chapter.

Today's State Workers Compensation Laws

All 50 states and the District of Columbia now have workers compensation laws, but the specific provisions of workers compensation laws vary considerably from state to state.

Often, employers simply buy a workers compensation policy and rely on it to provide all the protection they need against employment-related injuries. However, the differences in state laws and benefits can expose businesses to liabilities far greater than expected, and properly insuring these risks may require modifying the policy with one or more standard or manuscript endorsements.

This section summarizes key state workers compensation laws. The information in the following discussion provides an overview. Items discussed include the following aspects of state workers compensation laws.

- Covered versus elective laws
- Exclusive remedy
- Penalties for failure to insure
- Covered employments
- Independent contractors
- Employee leasing
- Sole proprietors, partners, executive officers, and limited liability companies
- Elective coverage
- Suits against third parties
- Waiver of subrogation
- Injuries not covered
- Occupational disease
- Extraterritorial application
- Workers compensation benefits

Most of the topics reviewed in this section can be found in the state workers compensation statutes. Due to the general nature of the discussion, readers should consult the workers compensation statutes of a state for the specifics of that state's workers compensation law. Qualified legal counsel should be consulted for legal interpretation of the statutes.

Compulsory versus Elective Workers Compensation Laws

Today, the vast majority of state workers compensation laws are compulsory, meaning that an employer must accept the law and pay workers compensation benefits, as specified by that state, to an injured employee who is covered under the law.

Two states—Texas and New Jersey—currently have elective workers compensation laws, meaning that an employer has the choice of either accepting or rejecting the workers compensation law. However, in New Jersey, employers are required to purchase either workers compensation coverage or employers liability coverage. If an employer in one of these states decides to reject the law and an injured employee brings a negligence suit against the employer, the employer will be denied the use of the three common law defenses of assumption of risk, contributory negligence, and negligence of a fellow employee. In practice, because of the threat of facing a large liability suit without these three defenses, few employers in these states reject the workers compensation law.

Exclusive Remedy

Every state's workers compensation law contains an exclusive remedy provision that stipulates that the benefits prescribed in the act are the sole remedy against the employer for covered injuries sustained on the job. (Most states allow suits against the employer if the employer has failed to either purchase workers compensation insurance or obtain authorization to self-insure as required by the law. See the discussion of penalties below.)

Many states also allow suits against the employer when the employer intentionally caused the injury. Under these circumstances, most states deprive employers of the normal common law defenses (assumption of risk, fellow servant liability, and contributory negligence) against such allegations. The majority of states also shield fellow employees of compliant employers from tort liability when their negligence results in an injury to another employee. A few specifically allow suits against a fellow employee when that employee intentionally caused the injury.

Penalties for Failure To Secure Benefits

To compel compliance with the workers compensation insurance requirements, all states impose significant penalties for failure to secure benefits as required. Usually, penalties are in the form of fines, but quite a few states allow for the possibility of criminal penalties as well. Executive officers of a corporation may be personally liable for these penalties. In many states, employers can be enjoined from conducting business until compliance is achieved. Some state laws allow injured employees of defaulting employers to be awarded increased benefits, ranging from an additional 10 to 200 percent of the amount otherwise payable.

Most state laws specify that employees of employers who fail to secure compensation as required are entitled to bring an action for damages against the defaulting employer in the event of an on-the-job injury caused by the employer's negligence. In most states, an injured employee can sue the defaulting employer for damages as well as claim compensation benefits; in others, the injured worker must choose between filing a lawsuit based on negligence and collecting statutory benefits.

Covered Employments

In every state except Wyoming, the workers compensation act applies to all employments except those that are specifically excluded; Wyoming takes the opposite approach of listing those employments that are covered by the act. Generally, exceptions apply to very small employers, employees performing specified types of work, or employees who work on a casual basis.

Number of Employees

Employers with fewer than a specified number of employees (typically three, four, or five) are exempt from the workers compensation law in 14 states.

Type of Work

Excluded categories of employees usually include domestic employees, agricultural employees, real estate brokers paid on commission, and "casual" employments. Of these excluded categories, only the casual worker is likely to be of concern to energy industry contractors. Although the term "casual employment" is defined in only a few states' laws, it is generally understood to mean work that is short term, of very limited scope, and not part of the employer's normal operations. For example, if a contractor hired college students for a week to clean up an equipment yard and pressure wash the equipment, that would probably qualify as “casual employment.”

The casual employment exemption is usually phrased something like “employments that are casual and not in the usual course of the employer’s business.” That is, in addition to being casual, the work must be outside the contractor’s normal business operations. For example, if a company hires a college student to design an Internet website for the company, that employment may be considered casual since the employment is very short term and the contractor is not in the business of designing websites. (Note that this exception would only apply if the applicable state law exempts casual employments.)

Employees not covered by the act retain their right to sue for damages caused by the employer’s negligence. If the employer has purchased a standard workers compensation policy to provide benefits for those in covered employments, the employers liability portion of this policy will respond to any suits by employees in exempted employments. However, employers with one or more employees that have not purchased a workers compensation policy because none of the employees are covered by the act probably have an uninsured exposure to employers liability lawsuits. (These types of claims are nearly always excluded from coverage under other—i.e., general liability, auto liability, etc.—insurance policies.)

Because employers liability insurance is seldom available except as part of a standard workers compensation and employers liability policy (and, with respect to the monopolistic states only, under a stop gap endorsement to a general liability policy), one way to view exemption from the act is that the state in question is granting the employer permission to “go bare” with respect to these employments. However, it may not be wise for employers to be uninsured against the possibility of lawsuits brought by injured exempt employees. While the employee must prove the injury was the result of the employer’s negligence, and the employer usually retains common law defenses (assumption of risk, fellow servant liability, and contributory negligence) in such cases, defense costs alone could bankrupt many contractors. This issue is discussed in more detail under “Elective Coverage” below.

Independent Contractors

The question of whether a particular work relationship is considered an employer-employee relationship, as opposed to a principal-independent contractor relationship, is important in the energy industry. State workers compensation laws vary as to their specificity on this point. Many are completely silent, in which case common law principles that distinguish between an employee and an independent contractor would usually govern, unless caselaw in the state in question has established exceptions to these principles. Some states specify that independent contractors are not employees and that the act does not apply to injuries sustained by independent contractors. However, only a few go beyond simply stating that independent contractors are not considered employees by including provisions that address the distinction between an employer-employee relationship and a principal-independent contractor relationship for purposes of workers compensation.

Employee Leasing

States take varied approaches toward employee leasing. Some states require licensing and registration. The majority of states have implemented statutes related to the placement of workers compensation insurance for leased employees. Approximately 40 percent of the jurisdictions have provisions in the workers compensation act regarding employee leasing. These provisions normally focus on determining the statutory employer and applying exclusive remedy in an employee leasing arrangement. A like number of other states address these same issues through state statute, separate from the workers compensation act, or through administrative rules. Employee leasing is discussed further in Chapter 3.

Sole Proprietors, Partners, Executive Officers, and Limited Liability Companies

In most states, sole proprietors and partners are not covered employees under the workers compensation act, but they may elect to be covered. In some states, the option to be covered only applies if the business’s other employees are covered under the act, either by law or by the employer’s election. For executive officers of a corporation, the opposite general rule applies; in most states, officers of a corporation (including the executive officers) are covered but may elect to be excluded under the act.

Many states allow only *executive* officers to exempt themselves; others do not specify which officers can exempt themselves but allow only a specified number of corporate officers to be exempt. (Which officers are considered executive officers may or may not be spelled out in the act.) A number of states address the status of limited liability company (LLC) members and managers. The LLC, which is a relatively new type of legal entity, is a hybrid that combines features of both corporations and partnerships. As a result, some jurisdictions view LLC members and managers as partners while others treat them as executive officers.

Keep in mind that, in many states, those who voluntarily exempt themselves from coverage under the act retain the right to sue the employer for damages caused by the employer's negligence. However, the standard endorsement used to exempt corporate officers and others from coverage under the employer's workers compensation insurance policy eliminates both workers compensation and employers liability coverage for injury to these individuals.

Elective Coverage

In most states, employers not subject to the act can voluntarily elect to be covered. In so doing, they become obligated to pay statutory benefits for covered injuries sustained by covered employees without regard to fault; they also obtain (at least limited) protection from lawsuits brought by injured employees due to the exclusive remedy provision. A few states allow employees in exempt employments to remain exempt even when the employer has elected to provide coverage, usually by notifying the employer in writing prior to the injury; otherwise, the employee is presumed to have accepted the provisions of the act.

In the majority of states, all an exempt employer must do to elect to be subject to the act is purchase insurance that clearly covers the otherwise exempt employments. Some states also require notification of voluntary election to the workers compensation administrator.

Suits Against Third Parties

Every state allows the employee and the employer to pursue an action against a third party responsible for a workplace injury. (The employer's right of action is transferred, i.e., "subrogated," to the workers compensation insurer when benefits are paid; the insurer can then file a claim against the responsible party.) The majority of states allow the employee to collect workers compensation benefits and also sue the responsible third party, but in a few states injured employees can do only one or the other.

All states allow the employer/insurer to recover workers compensation benefits paid when an employee successfully obtains damages or a settlement from a third party. Some states allow the employee first recourse against the third party, with the employer/insurer having a lien on the recovery; other states allow for joint recourse by the parties involved; and a few states provide for direct recovery by the employer/insurer. The states also take varied approaches regarding how the recovered funds are distributed between the employee and the employer/insurer.

Waiver of Subrogation

Companies frequently are required to obtain a waiver of subrogation from various insurers, including the workers compensation insurer. Many insurers resist granting waivers of subrogation or charge a potentially hefty premium for doing so.

The workers compensation insurer's ability to waive its right of subrogation is specifically addressed in only a few state statutes. Kansas, Kentucky, Missouri, New Hampshire, and New Jersey explicitly disallow waivers of subrogation. (In Kansas and Missouri, waivers of subrogation are barred only in the construction industry.) Companies operating in these states should be careful not to agree to provide a workers compensation waiver of subrogation.

Injuries Not Covered

Nearly all state workers compensation laws designate a few types of injuries as not compensable. For example, the majority of states stipulate that neither intentionally self-inflicted injuries nor injuries sustained in an attempt to injure someone else are compensable. Some states prohibit compensation for injuries sustained while the employee was committing a crime. The purpose of exclusions such as these is to remove from coverage injuries that are not truly the result of the employment.

Significant to the energy industry, some states provide that injuries suffered as a result of the employee's willful failure to use a safety device are not compensable. This provision may be inapplicable if the use of the safety device was not actively and consistently enforced.

Most states exclude injuries caused by the employee's drug use or intoxication with alcohol, although the specifics of the laws regarding such injuries vary. In some states, drug-related injuries are excluded only if the injury is caused by use of an illegal drug or narcotic; in others, it applies to injuries caused by the employee's use of any controlled substance, except when prescribed by a physician and used in accordance with the physician's instructions. Most states provide only that injuries "caused by" the employee's intoxication or drug use are not compensable. However, some require that the injury be "proximately caused by" the employee's intoxication or drug use, or that the impaired condition was "a substantial factor" in causing the injury.

A number of state workers compensation laws prohibit compensation for injuries caused by the employee's willful misconduct or willful negligence. Although what constitutes willful misconduct is seldom spelled out in the act, this provision alone would probably be sufficient to eliminate coverage for injuries caused by the employee's intoxication with alcohol or drug use in those states that do not have a specific alcohol or drug use provision.

Also specifically not covered in a number of states are injuries suffered while the employee was participating in voluntary recreational activities, provided that participation was not a job requirement. However, even in the absence of a specific provision addressing these situations, injuries suffered during participation in voluntary recreational activities (such as a softball game at a company picnic or bowling on a company-sponsored bowling team) would probably not be considered to have arisen out of or in the course of employment in most states. Likewise, while some states specifically exclude injuries intentionally inflicted by a third party or coworker for personal reasons, or reasons not related to employment, normally these types of injuries would not be deemed compensable even without such provisions.

Occupational Disease

Energy industry workers exposed to dust, hydrogen sulfide gas, drilling fluids, and a variety of chemicals may develop occupational diseases of the lungs, skin, and other organs. Hazardous noise levels may expose workers to hearing loss.

Occupational disease is a thorny issue, as it is often difficult to determine when the injury took place and whether the illness is really the result of the occupation or the result of other factors. A majority of states have specific provisions relating to silicosis. Some also have specific provisions relating to occupational hearing loss.

Provisions defining occupational diseases, and the conditions under which they are compensable, are too detailed to summarize in outline form. However, the general rule is that for occupational diseases to be compensable, there must be a direct causal link between the employment and the disease. The majority of states assign liability for a worker's occupational disease to the last employer in whose employment the employee was exposed to the hazards that caused the occupational disease. (Some of these states allow the last employer to recover from prior employers in certain situations.)

Most states impose time limitations for the filing of occupational claims. Such limitations normally begin on the date a diagnosis is confirmed or the date the employee knew or should have known through due diligence that the disease was work related. Further, in the case of death, some states require that the death occurred within a specified amount of time following last exposure to the condition giving rise to the disease.

Extraterritorial Application

Most workers compensation statutes specify the circumstances under which that state's act applies to injuries suffered outside the state. Usually, these circumstances involve when the contract of employment was made in the state or when the employment is principally localized in the state.

Some states also establish a time limit on coverage for out-of-state injuries; the most common limit is about 6 months. In these states, an employee working in another state for more than the designated duration, for example, 6 months, is no longer entitled to benefits in the home state. (However, the employee probably is entitled to the compensation in the state in which he or she is currently working.)

In certain instances, an employee who is injured in another state has the option of either filing under the extraterritorial provision of the home state or filing under the workers compensation law of the state in which the injury occurred. When faced with such a decision, the injured employee customarily will file in the state with the higher benefits.

Another issue relating to extraterritorial coverage of which contractors should be aware is that time limits on coverage for out-of-state injuries are particularly significant for employers operating primarily in monopolistic fund states because they may not have coverage for benefits payable under other states' workers compensation laws.

Some states' statutes exempt out-of-state employers and employees from the act if the employer has workers compensation insurance that covers the injury under another state's law. Usually, this provision is conditioned on the other state having a reciprocal provision that exempts out-of-state employers from the application of its act under similar circumstances.

By purchasing other states coverage in the workers compensation policy, the employer is protected in the event a workers compensation claim is filed in a state in which it has not purchased workers compensation insurance. Other states coverage is discussed further in Chapter 2.

Workers Compensation Benefits

The categories of workers compensation benefits payable to an injured worker or the worker's dependents are medical, disability, rehabilitation, and death. The dollar amounts of these benefits, as well as other related rules, vary considerably from state to state.

Medical Benefits

Medical benefits (payments for the medical treatment of an injured employee) account for almost half of the total workers compensation benefit payments in the United States. Most state statutes provide for unlimited medical benefits in terms of both dollar amounts and duration. In the few states that impose limitations on medical benefits, these limits may be exceeded upon the authorization of the state's workers compensation administrator.

Disability Benefits

The purpose of disability benefits is to replace the worker's loss of income or earning capacity that results from a compensable injury. The four classes of disability are temporary total, permanent total, temporary partial, and permanent partial.

- Temporary total disability is the most common type of disability. An employee with a *temporary total disability* is expected to recover from the injury and return to employment but is unable to do any type of work while recovering. The amount of the weekly benefit for a worker with a temporary total disability is set by state statute. It is expressed as a percentage of the worker's weekly wages (usually 66 2/3 percent) and is often subject to a minimum and/or maximum dollar amount. Some states also place a limit on the number of weeks and/or total dollar amount an employee can collect for a temporary total disability. However, most states will pay temporary total disability benefits for the duration of an employee's disability without limiting the total amount.
- *Permanent total disability* means that an injury is suffered that leaves the employee unable to do any kind of work for the remainder of his or her life. As with a temporary total disability, the

weekly benefit is a percentage of the employee's weekly wages and is subject to the same minimum and/or maximum weekly payment. The majority of states will provide permanent total disability benefits for life.

- A worker with a *temporary partial disability* can still do some work but is unable to earn his or her usual wage until fully recovered. Compensation for a temporary partial disability is usually calculated as a percentage of the difference between the weekly wage earned during the recovery period and the weekly wage that would have been earned had no injury taken place.
- A *permanent partial disability* occurs when an employee suffers an injury from which he or she will never recover, but the injury is such that the ability to work is only partially affected. In other words, the worker can still do some work but his or her earning capacity is less than it would be had no injury occurred.

Most states have developed a list of specific injuries and corresponding benefits, which is used to compensate workers with the more common permanent partial disabilities. These lists of injuries, commonly referred to as "scheduled injuries," generally include the loss or loss of use of certain specified body members (e.g., a hand, an arm, or a leg) and the loss of hearing or eyesight. The benefit levels for scheduled injuries vary from state to state. A number of states have moved away from the use of a schedule of injuries to compensate workers for permanent partial disabilities. The most common approach used by these states for the determination of benefits is to base compensation on the percentage the disability bears to total permanent disability. In states utilizing a schedule of injuries, injuries not covered by the schedule are normally compensated in the manner just discussed or like temporary partial disability (a percentage of the wage lost).

Regardless of the type of disability, all states have a waiting period during which disability benefits are not payable. The length of the waiting period varies from state to state, but 3 days is the most common time period. Essentially, the waiting period acts as a deductible and eliminates the administrative work for small claims. It is important to note that the waiting period applies only to disability benefits; medical benefits are immediately payable. Normally, if the disability lasts beyond a specified number of weeks (usually 2 or 3), retroactive disability benefits will be paid back to the date of injury.

Rehabilitation Benefits

Although early workers compensation laws did not provide for employee rehabilitation, most state workers compensation laws now contain specific provisions related to the rehabilitation of injured workers. These provisions generally make rehabilitation and reimbursement for rehabilitation-related expenses (such as board, lodging, and travel) available to an injured worker. While most states specify that such rehabilitation must be funded directly by the employer or its insurer, a number of states have set up special state funds to pay for rehabilitation costs. The sources of these funds are often taxes levied against insurers and self-insurers operating in the state and federal funds granted under the Rehabilitation Act of 1973.

Death Benefits

If a worker is killed and the death arises out of and in the course of employment, death benefits are paid. These benefits consist of a burial allowance and a weekly income benefit designed to help compensate those dependent on the lost income. The amount of these weekly income benefits varies from state to state and is usually expressed as a percentage of the weekly wages of the deceased worker, subject to a maximum and minimum weekly benefit. There is often a time limit on such benefits, with the children's benefits usually ending at age 18 and a spouse's benefits usually ending at remarriage.

Chapter 2
The Workers Compensation and Employers Liability Policy

Chapter Overview and Objectives

The National Council on Compensation Insurance (NCCI), which serves as the filing agency and rating organization for workers compensation insurance in the majority of states, promulgates a standard workers compensation and employers liability insurance policy (WC 00 00 00 C). The 2015 edition of that policy is currently approved for use in all of the 46 states that allow private insurers to write workers compensation insurance, plus the District of Columbia. The other four states (North Dakota, Ohio, Washington, and Wyoming) require all workers compensation insurance to be purchased from a monopolistic state fund or qualify as a self-insurer in the states that allow it. Most states allow insurers to file their own forms, although few insurers choose to do so. Consequently, almost all workers compensation policies issued in the United States are written on the 2015 NCCI form.

On completion of this chapter, you should be able to

1. recognize the scope of coverage provided under the standard, unendorsed workers compensation and employers liability policy, and
2. recognize situations or circumstances in which an unmodified workers compensation insurance policy does not apply.

Although the standard workers compensation policy provides only two basic types of coverage, the policy is divided into three coverage parts. Part One, workers compensation insurance, provides coverage for statutory benefits payable under the laws of the covered states specified in the policy. Part Two, employers liability, provides coverage for the employer for liability claims by employees or their dependents that fall outside the protection of the workers compensation law. Part Three, other states insurance, provides coverage for liabilities payable under the workers compensation statutes of specified additional states.

Coverage typically is provided for all states in which the insured actually performs operations under Part One of the policy, but employers may have incidental exposures in other states, such as when an employee is injured while traveling to a seminar in another state. Other states coverage is designed to pick up these incidental liabilities but only for the states specified on the policy's information page. (The "information page" is the declarations page on which the named insured, its address, and certain other data are scheduled.)

The remaining three "parts" of the policy are not coverage granting, and they address issues such as the employers' duties when an injury occurs, how the premium will be calculated, and other policy conditions. A general section at the beginning of the policy clarifies issues such as who is an insured under the policy, what locations are covered, and what exactly is meant by the terms "workers compensation law" and "state."

This chapter will examine the scope of coverage under the general section and each coverage part of the standard workers compensation insurance policy.

General Section

The general section begins by establishing who is insured under the policy and what locations are covered and defines the terms "workers compensation law" and "state." The use of such terms is in keeping with most "plain English" policies.

Who Is an Insured

The "insured" is the employer listed in item 1 of the information page. An employer can be an individual, partnership, joint venture, association, corporation, or the legal representative or trustee of the insured. If the listed employer is a partnership, each individual partner is insured but only in his or her "capacity as an employer of the partnership's employees." This means that if one of the partners has household employees or is involved in another business entity other than the partnership named on the information page, that partner is not an insured with respect to benefits or damages owed to those other employees. If the insured is a joint venture, only the joint venture entity is covered. If so desired, the individual entities that form the joint venture can also be made insureds by attaching the joint venture as insured endorsement (WC 00 03 05).

Neither corporate officers nor any other of the contractor's employees are insureds under the standard workers compensation policy. This means that the employers liability portion of the policy does not provide coverage for any suits by an injured employee against a coemployee (including a corporate officer). Although most states allow an employee to sue another employee in connection with workplace injury only if the injury was intentional or the result of gross negligence, some states place no restrictions on lawsuits against coemployees. Where coemployee lawsuits are permitted, employees meeting the commercial general liability (CGL) policy's definition of "executive officer" have coverage under the CGL policy. Coverage for other specified employees can be added to the CGL policy by endorsement.

The question of whether employees are "insureds" under a workers compensation policy (and therefore are covered for any liability that might be imposed on them in connection with a work-related injury to another employee) is entirely different from the question of which employees are entitled to receive workers compensation benefits. Under the workers compensation law of most states, executive officers of a corporation (generally defined as the president, vice presidents, secretary, and treasurer) are eligible to receive benefits in the event of compensable injury or disease. However, many states allow an executive officer to elect not to be covered. On the other hand, partners and sole proprietors usually are not eligible to receive benefits but can, in many states, elect to be covered. The treatment of members and managers of limited liability companies (LLCs) varies from jurisdiction to jurisdiction since an LLC is a hybrid of a corporation and a partnership. Some jurisdictions consider them executive officers while other jurisdictions treat them as partners.

Although there is no reference in the policy to whether more than one entity may be insured under a policy, most states allow the combining of certain entities under one workers compensation policy. Briefly, combinable entities are those that share a common majority ownership interest. Common majority interest exists when the same person, group of persons, or corporation owns more than 50 percent of each entity or when one entity owns a majority interest in another entity, which in turn owns a majority interest in a third entity. There is no limit to the number of entities that may be combined, but each entity must be separately identified, classified, and rated.

Additional Insureds

Since the sole purpose of the workers compensation policy is to cover injuries to the insured's employees, it is not appropriate for one party to a contract (e.g., the owner of a drilling project) to require the other party (e.g., a contractor) to provide additional insured status under the workers compensation policy (as is commonly done with general liability insurance). If this were to occur, the additional insured project owner would be covered for injuries to its own employees—unrelated to the contractor's operations for the project owner—under the contractor's workers compensation policy. Further, adding a project owner to a workers compensation policy would almost always violate the General Rule 3-A-5 of the NCCI *Basic Manual for Workers Compensation and Employers Liability Insurance*, which states that "separate legal entities may be insured in one policy only if the same person, or group of persons, owns the majority interest in such entities."

However, a related sort of coverage problem can arise when an insured temporarily lends or leases its employees to someone else, such as when a contractor rents out a piece of equipment with an operator. To ensure coverage for such employees under the contractor's workers compensation policy, an alternate employer endorsement (WC 00 03 01 A) should be attached to the insured's policy. (See the discussion of endorsements in Chapter 3 for more information about this endorsement.)

Covered Workplaces

The policy covers all of the insured's workplaces listed on the information page. In addition, any other workplace that is located in a state listed in item 3.A. of the information page is covered unless the insured has purchased another workers compensation policy to cover that workplace or is self-insured for that workplace.

Some states allow an insured with multiple locations in the state to have more than one policy (although all operations of any one employer at a single location usually must be insured in one policy, to avoid disputes between insurers as to whose policy covers a particular claim). For this reason, the provision granting automatic statewide coverage for all workplaces of the insured contains an exception for any workplace that is covered under another workers compensation policy. In states that allow employers to insure their workers compensation liabilities under more than one policy, the designated workplaces exclusion endorsement (WC 00 03 02) can be used to exclude locations covered under other workers compensation policies. Situations when a business might want to have more than one workers compensation policy, if allowed, include the following.

- When the insured is a contractor working on a large construction project subject to a wrap-up plan, a single consolidated insurance program covering all parties to the construction project for that project only
- When the insured has several operations, one of which is a high-risk or specialty operation (a nuclear power plant or a hospital, for example) that is best insured in a specialty market or that only specialty markets are willing to insure
- When a parent company has several subsidiary companies involved in very different types of operations

The workers compensation laws of all states except North Dakota and Wyoming allow a private employer to self-insure its workers compensation liabilities rather than purchase workers compensation insurance, provided that the employer has satisfied the applicable self-insurance requirements. Therefore, the provision granting automatic statewide coverage for all workplaces of the insured in states listed under item 3.A. on the information page also contains an exception for any workplace for which the insured is self-insured.

Definitions Regarding Applicable Law

"State" is defined as "any state of the United States of America and the District of Columbia." However, in the "monopolistic fund states," coverage must be obtained from a state fund. Consequently, these states should not be entered onto the policy's information page where the states for which the coverages apply are scheduled. (See the discussion of stop gap endorsements in Chapter 3 for information on how to provide employers liability coverage in the monopolistic states.)

Note that this definition does not include United States territories, such as American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. Coverage for the workers compensation law of a U.S. territory—other than those with monopolistic funds—can be provided by naming the territory in item 3.A. of the information page.

When the term "workers compensation law" is used in the policy, it means the workers compensation and occupational disease law of each state or territory named in item 3.A. of the information page. It is the provisions of the workers compensation law of the applicable state(s) or territory(ies), *not* the terms and conditions of the policy, that determine exactly what workers compensation coverage is provided.

Unless coverage has been added to the policy by endorsement, no coverage is provided for liability imposed by a federal workers compensation-type law.

Part One—Workers Compensation Insurance

As noted previously, state workers compensation statutes generally require an employer to make specified benefit payments to an employee (or the employee's family) who suffers a job-related bodily injury (including death) due to an accident or occupational disease.

There is no policy limit for benefits payable under the workers compensation insurance section of the policy. Rather, the insurer's liability is equal to the benefits prescribed under the applicable state workers compensation law, except for exemplary or punitive damages, fines, or penalties in excess of normal workers compensation benefits.

Under workers compensation insurance, the insurer agrees to "pay promptly when due the benefits required of you by the workers compensation law" as long as the bodily injury or the last exposure to the conditions that cause or aggravate the occupational disease occurs during the policy period. Because of this provision, a workers compensation policy can cover claims made long after its expiration date and therefore should never be discarded.

The insurer also agrees to defend, at its own expense, any claim or suit against the insured that is payable under the policy. However, the insurer has "the right to investigate and settle" these claims or suits. This is an important provision since it gives the insurer the right to settle workers compensation claims without the insured's consent. Some employers negotiate a claim agreement with the insurer that allows them to participate in claim settlement decisions, especially when a large deductible or other loss-sensitive rating program is in place.

In addition to benefits payments and defense costs, the insurer also agrees to pay certain expenses, as shown in Exhibit 2.1.

Exhibit 2.1
Additional Expenses Paid by the Insurer under Part One of the Workers Compensation Policy

- Reasonable expenses incurred at the insurer's request (but not loss of earnings)
- Premiums for bonds to release attachments and for appeal bonds
- Litigation costs taxed against the insured
- Interest on any judgments
- Expenses incurred by the insurer

The payments for which the insured will be responsible are also delineated. The insured is responsible for any payment "in excess of the benefits regularly provided by the workers compensation law." This includes the following.

- Excess payments that must be made because of the insured's serious and willful misconduct. For example, there would be no coverage for punitive or exemplary damages that must be paid in addition to regular workers compensation benefits because an insured intentionally injures an employee.
- Excess payments required because the insured knowingly employs an employee in violation of the law. For example, suppose the insured hires a minor in violation of the law, despite knowing that the employee is underage, and the minor is injured on the job. Many states require an employer to pay a penalty amount in addition to regular workers compensation benefits if an illegally employed minor is injured on the job. This additional amount is not covered by workers compensation insurance.
- Excess payments required because an employee is injured due to the insured's failure to comply with a health or safety law, such as the Occupational Safety and Health Act (OSHA).
- Excess payments due to the discharge of, coercion of, or discrimination against an employee in violation of the workers compensation law. For example, many states require an employer to pay a penalty in addition to regular workers compensation benefits if it is found guilty of retaliatory discharge (i.e., discharging an employee simply because the employee filed a workers compensation claim). The workers compensation policy provides no coverage for this type of penalty.

In general, this provision makes clear that the insurer has no intention of being responsible for any punitive or exemplary damages. If the insurer does pay charges that are in excess of the regular benefits required by the workers compensation law on behalf of the insured, the insured must promptly reimburse the insurer.

In the event that benefits payments are made to an injured employee, the insurer has the insured's rights, as well as the injured employee's rights, to recover the benefit payments from any liable party. Furthermore, the insured is obligated to "do everything necessary to protect those rights for us and to help us enforce them." This condition has become increasingly important in recent years as workers compensation insurers have exercised their subrogation right more frequently.

Unlike the subrogation clause of most general liability and property insurance policies, the workers compensation policy does not imply permission for the insured to waive its right of recovery against a third party before a loss.

Subcontractors

In most states, the workers compensation statute specifies that contractors are liable for workers compensation benefits to the injured employee of an uninsured subcontractor. Although the upper-tier contractor's workers compensation policy will respond to such a claim (the obligation arises out of the statute, and the policy agrees to pay the contractor's statutory liabilities), the insurer will retroactively adjust the insured contractor's premium to reflect this increased exposure. Normally, this will be done by adding the uninsured subcontractor's payrolls for that project to the insured contractor's premium base at the year-end audit. In fact, Rule 2-H of the NCCI *Basic Manual* provides that in those states where the workers compensation laws make a contractor responsible for the payment of benefits to the employees of its uninsured subcontractors when the contractor cannot furnish evidence that a subcontractor has workers compensation insurance, the auditor can automatically add those payrolls to the contractor's premium base. For these reasons, contractors should be diligent about requiring certificates of insurance, or some other evidence of coverage, from all subcontractors and requiring updated certificates when the policies listed on the certificate expire.

Part Two—Employers Liability Insurance

Despite the exclusive remedy provision in most states' workers compensation laws, sometimes work-related injuries result in claims for "damages" that are outside the prescribed workers compensation benefits. For example, some states exclude certain employees—such as temporary or seasonal workers—from coverage under the statute, so unless coverage has been voluntarily extended to these employees, they are free to file claims outside the workers compensation system. Likewise, claims arising out of a covered employee's injury but filed by someone else, such as the employee's spouse or child, do not fall within the purview of the workers compensation statute.

Part One (workers compensation) of the standard workers compensation and employers liability insurance policy will not respond to claims outside the workers compensation statute, but Part Two, employers liability insurance, will respond to these claims. Because (most) claims arising out of injury to an employee are excluded under the commercial general liability policy, this is the only source of coverage employers have for such claims. The following Exhibit contains some examples of claims that would be covered under employers liability insurance.

Exhibit 2.2
Types of Claims Covered under Part Two—Employers Liability

- Suit filed by an injured employee who is excluded under workers compensation law
- Suit brought by an injured employee whose employer is not subject to workers compensation law because, for example, its workforce is so small
- Suit filed by an injured employee whose employer has elected not to accept the workers compensation law in one of the two states that allow employers to opt out
- Suit filed by an injured employee's spouse, claiming loss of consortium (e.g., sexual relations, companionship, and help in performing household chores and maintenance)

Coverage Criteria

Employers liability insurance applies to bodily injury, including death, by accident or disease. For a bodily injury to be covered, the following criteria must be met.

- The bodily injury must "arise out of and in the course of" the employee's employment with the insured.
- The injured worker's employment must be necessary or incidental to the insured's work in a state or territory for which Coverage A has been activated by its being listed on the information page.
- If the bodily injury is caused by an accident, the accident must occur during the policy period.
- If the bodily injury is caused by disease, the disease must be caused or aggravated by the conditions of the employment. In addition, the employee's last day of last exposure to the conditions that cause or aggravate the bodily injury or disease must occur during the policy period.
- The suit for damages must be brought in the United States, its territories or possessions, or Canada.

Although the policy applies to all employers liability claims not specifically excluded, it explicitly grants coverage for the following four common types of employers liability claims.

- Third-party-over suits
- Loss of consortium suits
- Dual capacity suits
- Consequential bodily injury suits

Third-Party-Over Suits

"Third-party-over" suits are filed by a third party seeking indemnity because it was held liable for an employee's injury. Suppose, for example, that an employee is injured while using a piece of machinery that the employer has not properly maintained. Despite payment of benefits payable under workers compensation law, the employee sues the manufacturer of the equipment who, in turn, sues the employer for contributory negligence. Tort laws vary from state to state. The differences in these laws will affect the potential for a third-party-over action and the results.

Loss of Consortium Suits

Loss of consortium suits are lawsuits filed by an injured employee's spouse for loss of the "services" of his or her spouse. Many state courts have held that the spouse of the injured employee has the right to sue and recover against the employer even if the injured employee is also receiving workers compensation benefits for his or her disability.

Dual Capacity Suits

Dual capacity suits are those in which the employer is sued for its involvement in the injury other than as the employer. For example, if a site preparation contractor manufactures a piece of equipment that leads to an injury, it can be sued in its capacity as a product manufacturer, in addition to being liable under the workers compensation law. However, an increasing number of states have begun to permit dual action suits only when the employer has a dual corporate persona—that is, when the employer has more than one business and the employee's injury stems from the operations of another of the employer's businesses.

Consequential Bodily Injury Suits

Consequential bodily injury suits are lawsuits filed by a family member for injury suffered as a consequence of the employee's injury. For example, the spouse of a severely injured employee might suffer a heart attack or a nervous breakdown upon learning of the injury. Many states have enacted legislation to limit consequential bodily injury suits.

Exclusions

Employers liability insurance contains the following exclusions shown in Exhibit 2.3.

Exhibit 2.3
Exclusions Contained in Part Two—Employers Liability

- Liability assumed under a contract
- Punitive or exemplary damages
- Injury to illegally employed persons (under certain circumstances)
- Injuries covered by the workers compensation statute or similar laws
- Intentional injury
- Injuries sustained outside the United States, its territories or possessions, or Canada, except with respect to citizens of the United States or Canada who are temporarily outside of these countries
- Employment-related practices
- Fines or penalties imposed for a violation of a federal or state law
- Injuries covered under a federal compensation act

Of the exclusions shown in Exhibit 2.3, the following have important implications for employers in the energy industry.

Contractual Liability

Liability assumed in a contract is excluded under the employers liability coverage part. The contractual liability exposure relating to the company's employees is a third-party-over action, in which the insured's injured employee brings a suit against someone else, such as the owner, who then tenders the suit back to the employer under a hold harmless agreement. The employers liability coverage will not respond because of this contractual liability exclusion. This exclusion is included to coordinate coverage with the commercial general liability (CGL) policy, which does cover such claims.

If a third-party defendant settles the claim and then attempts to recover damages from the employer based on negligence or any other grounds other than a contractual assumption of risk, the employers liability policy—not the CGL—will respond since the basis for the claim is not a contractual assumption of liability but one of negligence for injury to the contractor's employee. This dovetailing of coverage avoids overlapping coverage between the two policies that could lead to disputes.

Illegally Employed Persons

Both exclusion 2 and exclusion 3 of the employers liability section can serve to eliminate coverage with respect to injuries to illegally employed persons. Under no circumstances is there coverage for punitive damages assessed against companies for injuries to illegally employed persons. If the employer's executive officers were aware of the illegal employment, even "regular" (compensatory) damages are excluded. Given the number of immigrants employed in the energy industry, particularly in certain areas of the country, employers must be diligent to ensure these workers have the proper authorization to work in the United States.

Injuries Sustained in Foreign Countries

Subject to an important exception, injury that occurs outside the United States, its territories or possessions, and Canada is not covered. The exception is for citizens or residents of the United States or Canada who are temporarily outside the country. Employers liability in connection with injury to these employees is *not* excluded, even if it occurs outside these boundaries.

Keep in mind, however, that employees temporarily outside the country may or may not be entitled to workers compensation benefits if they are injured outside the country, depending on the extraterritoriality provisions of the applicable state law. Many states extend benefits to employees injured outside its borders (whether in another state or outside the country) provided that the contract of hire was made in the state or the principal localization of the employment is in the state. However, circumstances can arise under which such employees would not be entitled to state workers compensation benefits. In that event, the employee would not be barred from filing suit under common law for injuries sustained. Normally, such suits would be covered by the employers liability policy. However, with the exception of suits involving injuries sustained by citizens or residents of the United States or Canada who are temporarily outside these countries (including U.S. territories or possessions) on business, these claims would be excluded from coverage.

Employers undertaking work on an international basis should be alert to the possibility of suits that fall within the scope of the exclusion. In the case of foreign assignments lasting the duration of a major drilling project, there may be no coverage at all under the employers liability policy (nor would coverage be available under the CGL or any of the employer's other policies). At a minimum, disputes as to how long an employee can be considered to be "temporarily" outside the United States are to be expected.

Employers operating in other countries (or sending employees to other countries on business) can address these potential coverage gaps by providing voluntary compensation benefits for employees for whom they are not statutorily required to provide coverage. The standard voluntary compensation and employers liability coverage endorsement (WC 00 03 11 A) provides that if a covered employee is injured while temporarily on assignment outside the United States, benefits equivalent to those provided by the workers compensation law of the employee's home state are provided.

Employers assigning U.S. nationals to work indefinitely outside of the United States can arrange workers compensation coverage for injury to these employees by endorsement or under a separate policy. The NCCI voluntary compensation endorsement just described is sometimes used to provide coverage to workers located in foreign countries, but a foreign voluntary workers compensation policy or endorsement is preferred. Foreign voluntary workers compensation endorsements are not standard, but manuscript endorsements are in widespread use. Typically, a foreign workers compensation endorsement consists of the text of the NCCI voluntary compensation endorsement plus language providing coverage for endemic disease and repatriation expense. (An endemic disease is one that is peculiar to a particular country. Repatriation expense coverage reimburses the insured for expenses over and above normal transportation costs when it is necessary to bring an injured, sick, or diseased employee back to the United States.) The endemic disease coverage under a foreign workers compensation coverage endorsement establishes that coverage applies to injury or death arising out of endemic disease even if the disease is not covered under the workers compensation or occupational disease law of the designated state. Because the extra transportation costs associated with returning an injured, ill, or deceased worker to the United States can be enormous, repatriation expenses are considered an important extension of coverage.

Employers with a significant number of employees traveling internationally on business should consider buying this coverage for all employees injured outside the United States, regardless of whether the assignment is temporary or permanent. Some foreign workers compensation coverage endorsements impose a sublimit or a per employee limit on repatriation expense coverage. Employers should attempt to verify that this limit will be adequate for the country or countries involved.

Employment-Related Practices

The intent of the insurance industry is for workers compensation insurance to apply to employee on-the-job injuries covered under state statutes and certain closely related negligence claims resulting from unintentional employee injuries that are not covered under state acts. Employment practices liability (EPL) claims—such as discrimination, wrongful termination, and harassment—are intentional torts that are often the subject of federal laws, and they consequentially fall outside the philosophical boundaries of workers compensation insurance envisioned by the industry. The industry has developed a special insurance product known as employment practices liability insurance (EPLI) to cover these exposures, and this insurance is readily available from many liability insurers.

While this employers liability exclusion will probably be effective in precluding coverage for EPL claims under employers liability coverage, it does not apply to the policy's workers compensation coverage under Part One. Consequently, if an employee sustained injuries, such as mental anguish, from an employment practice deemed compensable under applicable state workers compensation law, Part One of the policy would apply.

A similar exclusion is commonly attached to commercial general liability (CGL) policies by endorsement. Consequently, employers will not be covered for most employment practices liability claims unless specific EPL insurance is purchased.

Injuries Covered under a Federal Compensation Act

The standard workers compensation and employers liability policy excludes all bodily injuries to persons covered by federal acts, including (but not limited to) the Jones Act, the Longshore and Harbor Workers' Compensation Act, the Outer Continental Shelf Lands Act, and the Defense Base Act. Thus, unless coverage for liability imposed by a specific federal act is added to the policy by endorsement, as discussed in Chapters 5 and 6, the workers compensation and employers liability policy provides no coverage.

Limits of Liability

Unlike the workers compensation section of the policy, employers liability insurance does have specific limits of liability. The following three separate limits apply.

- The "bodily injury by accident—each accident" limit shown on the information page is the most the insurer will pay for all claims arising out of any one accident, regardless of how many employee claims or how many related claims arise out of the accident.
- The "bodily injury by disease—each employee" limit shown on the information page is the most the insurer will pay for damages due to bodily injury by disease to any one employee.
- The "bodily injury by disease—policy limit" shown on the information page is the most the insurer will pay for employee bodily injury by disease claims in the policy period (usually 1 year), regardless of the number of employees who make such claims.

While the basic limits are $100,000 for "bodily injury by accident—each accident," $100,000 for "bodily injury by disease—each employee," and $500,000 for "bodily injury by disease—policy limit," these limits can be increased.

Regardless of the applicable limit, the insured's umbrella liability policy should be written so that it will attach where the employers liability insurance leaves off, providing even higher limits of liability. In conjunction with this, any umbrella exclusions related to the operation, ownership, or use of watercraft or aircraft should have exceptions as regards injury to employees. Exclusionary endorsements that restrict coverage as respects injury to employees, such as for occupational disease, should be avoided to the extent possible.

The insurer agrees to defend, at its own expense, a claim against the insured for damages payable under employers liability insurance. However, the insurer has no duty to defend a claim once an applicable limit of liability has been exhausted.

Part Three—Other States Insurance

The coverage provided by workers compensation insurance applies only to claims brought under the workers compensation laws of the states listed on the information page as being covered. Coverage does not apply to workers compensation claims filed in other states. Even when all states in which the insured has operations are listed on the information page, potential coverage gaps exist. For example, a worker injured while traveling in another state on business, such as to attend an educational conference, may qualify for benefits under that state's workers compensation statute. If the benefits payable in that state are higher than those payable in the worker's resident state, he or she may opt to file for benefits in that state. If the state is not listed in item 3.A., the workers compensation coverage will not respond, nor will the employer's liability coverage apply since that portion of the policy specifically excludes benefits payable under a workers compensation statute. The employer, rather than the insurer, would be responsible for paying the workers compensation claim.

Other states insurance is available to fill such coverage gaps. When activated as discussed below, this section of the standard policy makes available both workers compensation and employers liability insurance for incidental exposures in states not listed in item 3.A. of the information page to activate coverage under Part One (workers compensation insurance).

The states for which other states coverage is desired must be listed in a different space (item 3.C.) on the information page. The only states that cannot be listed are the monopolistic fund states and territories (North Dakota, Ohio, Washington, and Wyoming, plus Puerto Rico and the U.S. Virgin Islands) and states already designated for workers compensation and employers liability coverage in item 3.A. If a state is not listed in item 3.C., no protection is provided for incidental exposures in that state. To avoid an uninsured loss due to clerical oversight, an all-inclusive statement such as “all states and U.S. territories except North Dakota, Ohio, Washington, Wyoming, Puerto Rico, the U.S. Virgin Islands, and states designated in item 3.A. of the information page” should be inserted here.

For various reasons, some insurers may not be willing or able to write blanket other states coverage. For example, an insurer may not be properly licensed to do so in some states. When an insurer does provide other states insurance coverage in a state where it is not licensed to write workers compensation coverage, it may be unable to pay benefits directly to the injured employee, which leaves the contractor with the responsibility of paying the benefits. However, in that instance, the insurer agrees to reimburse the insured for the benefits required by the workers compensation law of that state.

Other states insurance is designed to cover only incidental exposures. If an employer begins operations in one of the states listed for other states insurance, it must immediately notify the insurer. If the insurer agrees to write the coverage for the operation, it will delete that state from the other states coverage and add it to item 3.A. of the information page, thereby providing regular workers compensation and employers liability coverage in that state. Employers with potential incidental operations in monopolistic fund jurisdictions may be able to close the gap thereby obtaining coverage under a manuscript “extended protection endorsement” that provides for reimbursement of benefits required of the insured under the workers compensation laws of these jurisdictions. Note that this endorsement does not serve as a replacement or substitute for workers compensation insurance that an employer must secure for actual operations in monopolistic states via their fund mechanisms.

Part Four—Your Duties If Injury Occurs

In the event of an injury that may be covered by the policy, the insured has the following duties.

- Notify the insurer of the injury “at once” when an injury occurs that may be covered.
- Provide immediate medical attention and any other services that are required by the workers compensation law.
- Supply the insurer or the insurer’s agent with the names and addresses of the injured parties and the witnesses and any other information the insurer may need.
- Promptly give the insurer all notices, demands, and legal papers related to the injury, claim, proceeding, or suit.
- Cooperate with the insurer and assist the insurer, if necessary, in investigating, settling, or defending any claim, proceeding, or suit.
- Do nothing after an injury occurs that would interfere with the insurer’s right to recover from others.
- Make no voluntary payments, assume no obligations, and incur no expenses, except at the insured’s own expense.

Part Five—Premium

This section explains how the policy premium is determined. It describes how premiums are calculated according to the insurer’s manuals of rules, loss costs/rates, rating plans, and classifications and how any changes in the manual can be applied to the policy if authorized by law or a governmental agency regulating workers compensation insurance.

It briefly describes the classification system and states that the classifications shown on the information page may be changed, via endorsement, if they do not accurately describe the work the insured engages in during the policy period.

The premium for a work classification is determined by multiplying the rate by the appropriate premium basis. Remuneration is the most common premium basis for workers compensation. It includes payroll and all other remuneration paid or payable during the policy period for the services of all the insured's executive officers and employees engaged in work covered by the policy. If an officer has elected not to be subject to workers compensation law, the policy must be so endorsed and that officer's remuneration will be excluded.

Remuneration also includes amounts paid or payable to all other persons engaged in work that could make the insured responsible for workers compensation benefits. This provision is necessary because the majority of state workers compensation laws specify that a principal (the party offering the contract) will be responsible for paying workers compensation benefits for an injured employee of its independent contractor *if that contractor has no workers compensation coverage*. Since the insurer agrees under workers compensation insurance to pay all benefits required of the insured under workers compensation law, it will be responsible for making benefit payments just as if the injured employee of the independent contractor were an employee of the insured. Therefore, the insurer is entitled to extra premium based on the exposure presented by an independent contractor who is uninsured for workers compensation. If the insured maintains payroll records of the independent contractor's employees, payroll will serve as the premium basis. However, if no accurate records are kept as to the separation of wages and materials in the contract cost, the insurer may use the full contract cost as the premium basis.

It is very important to note that this provision is subject to state statutory language and may not apply when the insured can supply the insurer with proof that the independent contractor has secured proper workers compensation insurance. Therefore, it is generally recommended that a contractor hire only those independent contractors who furnish their own workers compensation insurance and can provide satisfactory evidence of such insurance (i.e., a certificate of insurance). If the contractor does wish to hire an uninsured independent contractor, the extra premium cost could be considered when negotiating the contract cost. If so, proper payroll records should be maintained to avoid paying a premium based on the entire contract amount.

The premium shown on the information page is merely an estimate. The final premium is determined when the policy period ends by using the actual premium basis (i.e., the actual remuneration figures), rather than the estimate made at the beginning of the policy period and the proper classifications and rates that reflect the insured's work during the policy period. If the final premium is more than the deposit premium paid by the insured, the insured must pay the insurer the balance. If it is less, the insurer will refund the balance to the insured.

The insured is obligated to keep records of information needed to compute the policy premium. In order to determine the final premium, the insurer, as well as an authorized rating organization, has the right to audit the insured's records that relate to the policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. The insurer has the right to conduct these audits during regular business hours during the policy period and within 3 years after the policy period ends.

Part Six—Conditions

This section of the workers compensation and employers liability policy contains all the conditions applicable to both workers compensation and employers liability coverage.

According to the inspection provision, the insurer has the right to inspect the insured's workplace in order to help determine the insurability of the workplace and premium to be charged. However, the insurer is in no way obligated to perform such inspections. If an inspection is performed, the passing of the inspection is not a warranty of safe working conditions. Indeed, the provision states that "we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public." The strong wording of this provision is an attempt by the insurer to avoid liability arising out of a negligent inspection or failure to perform an inspection.

The long-term policy provision states that if a policy is issued for a period longer than 1 year and 16 days, the provisions of the policy will apply as if a new policy were issued on each anniversary date. For example, suppose the policy is issued for a 2-year period and the rate for the insured's work classification changes during the first year of the policy. At the anniversary date, this new rate would be used in computing the insured's premium for the second year.

The insured's rights or duties under the workers compensation policy cannot be transferred to another without the written consent of the insurer. For example, if Contractor A sells his business to Contractor B, he cannot assign coverage under his workers compensation policy to Contractor B unless written consent is given by the insurer. However, special consideration is granted in the case of the death of an insured. If the insured dies during the policy period and written notice is given to the insurance company within 30 days after the date of such death, the policy will cover the insured's legal representative as insured.

The insured can cancel the policy by simply mailing or delivering an advance written notice to the insurer that states when the coverage is to be terminated. In order to cancel the policy, the insurer must give the insured not less than 10 days' advance written notice. However, if state law requires a longer notice of cancellation, the policy is changed to comply with that law.

Workers compensation policies often insure two or more employers (e.g., subsidiary companies). The first insured named in item 1 on the information page is authorized to act on behalf of the other insureds to change the policy, to receive unearned premium, and to give and receive notice of cancellation.

Chapter 3
Workers Compensation Endorsements

Chapter Overview and Objectives

There are more than 80 National Council on Compensation Insurance (NCCI) endorsements that can be used to modify the 2015 NCCI workers compensation and employers liability policy. There are four categories of NCCI endorsements that alter the coverage or pricing of the policy.

- Federal coverage endorsements
- Maritime coverage endorsements
- Other coverage and exclusion endorsements
- Premium endorsements

The “other coverage and exclusion endorsements” category includes all coverage endorsements other than the federal or maritime coverage endorsements. Within it are a number of endorsements that address employee leasing situations and a few that address voluntary compensation coverage, but otherwise the endorsements in this group are too varied to label meaningfully with a single descriptive title.

In addition, each state also promulgates standard endorsements for use only in that state. For example, many states require more than the 10-day advance written notice of cancellation that is required by the standard policy. A state-specific endorsement is needed to modify the policy’s cancellation provision to conform to state law.

Manuscript (or nonstandard) endorsements also are used by individual insurers to make changes in accordance with their own underwriting standards. In some cases, manuscript endorsements are negotiated between a specific insured and the insurer for exclusive use on that insured’s policy.

This chapter will examine some of the more frequently used other coverage and exclusion endorsements.

- Stop gap (employers liability coverage) endorsement
- Voluntary compensation and employers liability coverage endorsement
- Sole proprietors, partners, officers, and others coverage endorsement
- Joint venture as insured endorsement
- Alternate employer endorsement
- Employee leasing endorsements
- Defense Base Act coverage endorsement
- Waiver of subrogation endorsement
- Designated workplaces exclusion endorsement
- Terrorism and catastrophic loss endorsements

In addition, some commonly used nonstandard endorsements are reviewed, including broad form named insured endorsement, modified notice of injury endorsement, and extended notice of cancellation endorsement.

The maritime coverage endorsements will be discussed in Chapters 5 and 6.

On completion of this chapter you should be able to

- recognize the purpose and effect of various endorsements available for attachment to a workers compensation policy.

Stop Gap (Employers Liability) Endorsement

Employers whose only exposures in the monopolistic fund states (North Dakota, Ohio, Washington, and Wyoming) are necessary and incidental to their work in other states would have employers liability coverage for the exposure without the need for any endorsement. But an employer with operations in a monopolistic state that has purchased the required state workers compensation coverage has an employers liability coverage gap in that state. The coverage afforded by the policies or funds of these jurisdictions does not apply to injuries that are for any reason not covered by the workers compensation law, and the insured's "regular" workers compensation policy will not respond because the employment is not necessary or incidental to the employer's work in a covered state.

For employers with actual operations in monopolistic states, an employers liability coverage endorsement, often called a "stop gap" endorsement, eliminates this coverage gap. (NCCI endorsement WC 00 03 03 C applies in all states except Ohio. WC 34 03 01 accomplishes the same purpose for Ohio operations.)

The endorsement adds an exclusion for bodily injury to an employee when the insured employer is deprived of common law defenses or is subject to a penalty because of failure to provide workers compensation coverage. This exclusion is intended to prevent the insured from attempting to use the coverage provided by the endorsement as a substitute for required workers compensation insurance. The Ohio endorsement also adds an exclusion for bodily injury to the flying crew of an aircraft.

The primary use of this endorsement is to provide employers liability coverage in connection with operations in a monopolistic state fund state. However, it can also be used to provide employers liability-only coverage when the employer is not subject to the workers compensation law of a given state and needs only employers liability coverage. In addition, the endorsement can be used when the employer is self-insured for workers compensation benefits but elects to purchase employers liability insurance from an insurer.

Employers operating exclusively in one of the monopolistic fund states often will not purchase a workers compensation policy from the standard marketplace since they have no exposure outside the fund state. In this situation, a stop gap endorsement is sometimes attached to the employer's commercial general liability policy to provide coverage within the home state.

Voluntary Compensation Endorsement

In many states, certain categories of employees are not covered by workers compensation law. Employees who may not be covered under the workers compensation law of a given state include the following.

- Domestic workers
- Agricultural workers
- Volunteers
- Employees injured while temporarily outside of the United States or Canada
- Employees injured while on indefinite assignment outside of the United States or Canada

In addition, some states do not require employers with fewer than a specified number of employees to provide workers compensation benefits.

If an employer wishes to provide statutory benefits for these employees, a voluntary compensation and employers liability coverage endorsement (WC 00 03 11 A) can be added to the basic workers compensation policy. Under this endorsement, the insurer agrees to pay such employees benefits equal to those that they would have received had they been subject to workers compensation law. If the injured employee elects to collect the statutory benefits, he or she is required to sign a release absolving the contractor and the insurer from further liability. If the employee elects to file a suit against the contractor, coverage is provided under employers liability insurance.

The voluntary compensation endorsement is also used to cover U.S. employees who are temporarily on foreign assignments. Employees injured while temporarily outside of the country may or may not be entitled to workers compensation benefits, depending on the extraterritorial coverage provisions of the applicable state law. Many states extend benefits to those injured outside its borders (whether in another state or outside the country) provided that the contract of hire was made in the state or the principal localization of the employment is in the state. However, circumstances can arise under which such employees would not be entitled to state workers compensation benefits. While *employers liability coverage* does apply to injuries to employees temporarily outside of the United States or Canada (as long as the employer is legally liable for damages as a result), many employers prefer to address this exposure by arranging for voluntary compensation benefits coverage using this endorsement.

This approach is often less expensive than providing coverage through a separate foreign workers compensation policy. If such an employee is injured in the course of a foreign assignment, compensation benefits equivalent to the workers compensation benefits that would have been received in the employee's home state are provided. However, employees who are hired or assigned to work indefinitely outside the United States should be covered under a foreign workers compensation policy.

Since the types of employees to be covered must be listed in this endorsement, the phrase "all employees" should be used in order to avoid any denial of a claim due to clerical oversight.

Sole Proprietors, Partners, Officers, and Others

The workers compensation laws of certain states allow sole proprietors, partners, limited liability members/managers, and executive officers to elect to be covered under the state workers compensation law. If such persons elect to be covered by the law, the sole proprietors, partners, officers, and others coverage endorsement (WC 00 03 10) must be attached to the firm's workers compensation policy. The individuals who elect to come under workers compensation law can be designated for such coverage by naming them individually, such as "John Smith, Vice President," or by describing them. Examples of such descriptions might include "all partners" or "all executive officers except the president." This endorsement may only be used in states that allow such elective coverage. Generally, sole proprietors, partners, limited liability members/managers, and executive officers who have the opportunity to elect to come under workers compensation law should do so.

Other state workers compensation laws state that sole proprietors, partners, limited liability members/managers, and executive officers are expressly covered by workers compensation statutes but may elect to be excluded. This can be accomplished by adding the partners, officers, and others exclusion endorsement (WC 00 03 08) to the workers compensation policy. As with the previous endorsement, individuals may be designated by naming them or by describing them. This endorsement can only be used when the exclusion of such individuals is allowed under state workers compensation law.

Joint Venture as Insured Endorsement

When two or more employers form a joint venture to undertake one or more projects, the workers compensation and employers liability policies of these individual employers will not cover claims arising from work on the joint venture projects. A separate workers compensation policy should be obtained with the joint venture named as the employer. When such a policy is obtained, the insurer will add a joint venture as insured endorsement (WC 00 03 05) to the policy. The endorsement's purpose is to clarify that the coverage afforded by the policy applies to the members of the joint venture but only with respect to work associated with that joint venture.

Alternate Employer Endorsement

Companies that lend or borrow employees will usually need to take steps to make sure coverage is provided for these employees while they are working under such an arrangement. The “borrowed servant doctrine” holds that an employer (the “special” employer) who borrows or leases an employee from another firm (the “regular” employer) can be liable for workers compensation benefits owed to an injured worker under certain circumstances. Examples of situations where the borrowed servant doctrine may be applicable include hiring of temporary employees from “temp” agencies; renting of equipment, aircraft, or vehicles with operators, pilots, or drivers; bringing an employee of an equipment manufacturer to the site to train the contractor’s employees in the operation or maintenance of the equipment; or a joint venture using its partner’s employees.

Whether the company is the regular (lending) or special (borrowing) employer, it should ensure that coverage is provided for such employees. Coverage is provided by attaching an alternate employer endorsement (WC 00 03 01 A) to the regular employer’s policy. This endorsement extends coverage to employees injured while working for the specified alternate employer as though the alternate employer were an insured under the policy. The endorsement also stipulates that the insurer will not ask the alternate employer’s insurer to share in a loss covered by the endorsement.

Attachment of the alternate employer endorsement to the regular employer’s workers compensation policy eliminates the possibility that the alternate (special) employer might be held accountable for payment of workers compensation benefits to a borrowed or leased employee. Payroll of employees provided to the alternate employer will be included in the regular employer’s premium calculation. Accordingly, the alternate employer should not include the payroll for these employees in its payroll figures provided to its workers compensation insurer.

Employee Leasing Endorsements

In recent years, a growing number of employers lease their “employees” from a professional employer organization (PEO). The most commonly cited benefits of this arrangement include a reduced administrative burden and lower costs for insurance and employee benefits. Particularly for small and medium-sized firms (e.g., fewer than 100 employees), PEOs can often provide access to a variety of coverages and benefit options that would otherwise be unattainable. Some employers lease all of their employees; others lease only specific categories of workers.

Employee leasing situations raise questions over who is the employer for purposes of complying with the workers compensation statute. Some states have positively declared one party or both parties in a leasing arrangement to be the statutory employer; in the absence of a specific statute, common law prevails. In that case, the “borrowed servant” doctrine will operate just as it does when employers borrow or lend employees, which was discussed above. In a nutshell, the borrowed servant doctrine holds the special employer responsible for providing workers compensation benefits for leased employees under the following circumstances.

- An express or implied contract of hire exists between the special employer and the injured employee.
- The employee is engaged primarily in work for the special employer.
- The special employer controls the details of the work.

The special employer almost always will be found to be the common law employer based on these criteria. However, many states have declared that the special employer and the regular employer are coemployers for workers compensation purposes. In a coemployment relationship, the special and regular employers are jointly and severally liable for workers compensation benefits, and the exclusive remedy protection is thereby extended to both parties.

In most states, coverage arranged in residual markets must be insured on a multiple coordinated policy basis when the placement is made by the leasing company instead of the client. What this means is that each client of the leasing company is issued a policy in its own name to cover the employees leased by that client. Nonleased employees and any employees leased from other leasing companies are excluded from coverage under this policy. All policies issued to the clients of the same leasing company are assigned to the same insurer, who will arrange the policies with a common renewal date and send a master invoice to the leasing company. The leasing company is free to determine how it will pass the cost of the workers compensation coverage through to the clients.

Unlike the residual market, many states allow coverage to be arranged in the voluntary market in any manner the insurer and insured agree upon, as long as the arrangement does not violate any other state laws. State rules regarding the arrangement of workers compensation coverage for leased employees presumably are drafted to conform to that state's workers compensation law. Where the rules are silent on the matter, contractors should take steps to determine whether a particular arrangement will satisfy their legal obligations under their states' workers compensation statutes. The Industrial Accident Commission or Workers Compensation Bureau of the state in question should be able to clarify this issue.

Whether the special employer or the PEO is securing the coverage, attaching the appropriate combination of endorsements to each policy is crucial to executing the intent of the parties. The general strategy is for one party to secure coverage for the leased employees and add the other party as an alternate employer; coverage for these employees is simultaneously excluded under the alternate employer's policy. The party that is named as an alternate employer should require a certificate of insurance at inception of the lease and each renewal thereafter as evidence of coverage.

In consideration of the special needs of firms involved in long-term employee leasing arrangements, the NCCI has drafted six endorsements that, used in the correct combination, protect the interests of both the special employer and the PEO. Exhibit 3.1 shows the proper use of these endorsements, depending on whether the special employer or the PEO is securing the coverage. These arrangements assume that both parties maintain a workers compensation insurance policy regardless of where the leased employees are covered. In most circumstances, this is a prudent risk management strategy, and where the special employer also has nonleased employees, it will be necessary.

The labor contractor endorsement (WC 00 03 20 A) is a form of "additional insured endorsement" that, when attached to the special employer's policy, extends coverage to the PEO for any liability it may have arising out of injuries to employees leased to the contractor. Consistent with the intention of the parties, it also waives the special employer's workers compensation insurer's right of subrogation against the PEO.

The employee leasing client endorsement (WC 00 03 19) and the labor contractor exclusion endorsement (WC 00 03 21) are intended as substitutes. That is, when the PEO is not responsible for providing the workers compensation coverage, one or the other, but not both, should be used on the PEO's policy. The employee leasing client endorsement excludes coverage for leased employees and reinforces the intent that the special employer provide this coverage. However, the endorsement does provide contingent coverage for the PEO's liability to leased employees in the event the special employer fails to provide the coverage. The labor contractor exclusion endorsement, however, contains an absolute exclusion of coverage for these employees. Clearly, the employee leasing client endorsement is the preferred endorsement since it fills a potential gap in coverage, generally at no additional cost unless the coverage is activated.

Exhibit 3.1
Arranging WC Coverage on Leased Employees*

The following endorsements should be used when the *special employer* is securing the coverage.

- **Special Employer's Policy:** Labor Contractor Endorsement (WC 00 03 20 A)
- **PEO's Policy:** Employee Leasing Client Endorsement (WC 00 03 19) or Labor Contractor Exclusion Endorsement (WC 00 03 21)

The following endorsements should be used when the *PEO* is securing coverage in the voluntary market.

- **Special Employer's Policy:** Employee Leasing Client Exclusion Endorsement (WC 00 03 22)
- **PEO's Policy:** Alternate Employer Endorsement (WC 00 03 01 A)

The following endorsements are *required* when the *PEO* secures coverage in the residual market in states that have adopted the NCCI rule on employee leasing.

- **Special Employer's Policy:** Multiple Coordinated Policy Endorsement (WC 00 03 23) and Labor Contractor Endorsement (WC 00 03 20 A)
- **PEO's Policy:** Labor Contractor Exclusion Endorsement (WC 00 03 21)

* ***Note**: These rules apply in most states.*

If the PEO purchases the coverage, the alternate employer endorsement (WC 00 03 01 A) should be attached to its policy to extend coverage to the special employer for any liability the special employer incurs for injuries to leased employees, whether under the workers compensation law or under common law. This is a form of additional insured endorsement and as such contains a waiver of the insurer's right to subrogate against the special employer. Coverage for leased employees is then deleted from the special employers policy by attaching the employee leasing client exclusion endorsement (WC 00 03 22), which is an absolute exclusion of coverage for liability to employees leased from the company named on the endorsement. Consequently, it is imperative that the special employer obtain proof that the leasing company has procured the appropriate coverage and attached the alternate employer endorsement, naming the special employer as an alternate employer. To this end, the cancellation provision of the standard alternate employer endorsement should always be modified to require that the alternate employer be notified of cancellation. Absent this modification, the policy can be canceled without notice to the contractor, leaving it with an uninsured exposure and (in most states) in violation of its statutory obligation to secure workers compensation coverage.

Some insurance professionals may advise against the use of the employee leasing client exclusion endorsement on the grounds that it could leave the special employer without coverage. However, unless this exposure is excluded, the payrolls of the leased employees will be included in the special employer's premium base. Further, if both policies apply to a given claim, the policy states that all policies providing coverage will share the loss equally until the loss is paid, which is contrary to the intent of the parties.

Defense Base Act Coverage Endorsement

Congress has extended Longshore and Harbor Workers' Compensation Act (LHWCA) benefits (discussed in Chapter 5) to civilian employees doing work for the federal government outside the continental United States. It covers not only the employees of contractors (including foreign nationals) doing work on foreign defense bases but also those employees engaged in foreign public works projects. For example, much of the work contracted by the U.S. government in Iraq and Afghanistan would fall under the Defense Base Act. Contractors can obtain coverage for this exposure by attaching a Defense Base Act coverage endorsement (WC 00 01 01 A) to the workers compensation policy. Unless an exposure develops, most insurers will add this endorsement without an additional premium charge.

However, if an exposure does exist, the cost for such coverage can be substantial.

Waiver of Subrogation Endorsement

Contractors are frequently required to waive rights of recovery against an owner or upper-tier contractor. When a waiver of subrogation, as this is called, is implemented, it prevents the contractor's workers compensation insurer from bringing an action against the other party (e.g., the owner or other contractor) alleging that the other party's negligence contributed to the injuries sustained by the contractor's employee.

To avoid disputes with insurers, employers should always attempt to have a waiver of subrogation endorsement attached to their workers compensation policies when they enter into a contract that stipulates that a subrogation waiver applies. The NCCI waiver of our right to recover from others endorsement (WC 00 03 13) may be used for this purpose. It was promulgated to specifically deal with waivers of subrogation and is the more desirable approach for an insured to use in obtaining a waiver of subrogation from its workers compensation insurer.

The endorsement includes a schedule in which the parties for whom the subrogation waiver applies are to be listed. The endorsement can be used on a case-by-case basis by indicating the particular organization for whom the waiver will apply on the schedule, or it can apply on a blanket basis by indicating in the schedule that it applies, for example, to "any party with whom the insured agrees to waive subrogation in a written contract."

A premium charge is generally made for a waiver of subrogation. When it applies on a blanket basis, the charge may be as much as 2 percent of the total policy premium. When the waiver is to apply to a single contract, the charge is usually 2 to 5 percent of the amount of the premium attributable to the project to which it applies.

The use of an endorsement instead of relying solely on a waiver of subrogation in the contract eliminates the possibility of future misunderstandings as to whether a waiver of subrogation in connection with a particular contract, or on a blanket basis, was intended. Compliance with the underwriting guidelines, as far as the waiver endorsement is concerned, is particularly advisable in light of the importance of workers compensation subrogation in any state's statutory compensation scheme.

Designated Workplaces Exclusion Endorsement

The designated workplaces exclusion endorsement (WC 00 03 02) excludes from coverage injuries incurred at workplaces described in the endorsement. It is often used when the insured is a contractor who is working on a large construction project subject to a wrap-up plan, a single consolidated insurance plan covering all parties to a construction contract. It may also be used when the employer has more than one workers compensation policy to exclude workplaces covered under the other policy.

Terrorism and Catastrophic Loss Endorsements

The Terrorism Risk Insurance Program Reauthorization Act of 2015 (TRIPRA of 2015) was signed into law on January 15, 2015. The Act extends the provisions of the Terrorism Risk Insurance Act (TRIA)/Terrorism Risk Insurance Program Reauthorization Act of 2007 (TRIPRA of 2007) until December 31, 2020, subject to some modifications related to the federal share of compensation due and the insurer aggregate trigger. The extension of TRIA was crucial to workers compensation. Unlike most other lines of insurance, workers compensation insurers may not exclude coverage for terrorism in any jurisdiction except Pennsylvania, which allows an exclusion for specific war-related activities.

In response to the passage of the Reauthorization Act of 2015, NCCI has issued two revised endorsements, the Terrorism Risk Insurance Program Reauthorization Act disclosure endorsement (WC 00 04 22 B) and the catastrophe (other than certified acts of terrorism) premium endorsement (WC 00 04 21 D) for attachment to workers compensation policies issued or in force on or after January 1, 2015, in jurisdictions that have approved the endorsements for use.

The Terrorism Risk Insurance Program Reauthorization Act Disclosure Endorsement was designed to identify and describe the requirements along with the premium charge attributable to TRIPRA of 2015. The Act, effective through December 31, 2020, continues to provide insurers a backstop for catastrophic losses similar to the ones resulting from the events of September 11, 2001. This endorsement is very close in wording to prior endorsements relating to federal terrorism legislation incorporating the amendments contained in the language of TRIPRA of 2015.

The endorsement contains a paragraph that states the policy provides coverage for losses resulting from "acts of terrorism," meaning those that have been certified by the U.S. Secretary of the Treasury. The wording, however, notes that coverage for this type of loss is dependent on all policy terms, definitions, conditions, and exclusions, as well as on any federal and state laws, rules, and regulations that may be applicable. This is an effort to make sure that the policyholder understands that a loss caused by "an act of terrorism" is not automatically covered if other policy language or governmental statutes and/or regulations would preclude it.

The intent of the catastrophe (other than certified acts of terrorism) premium endorsement when originally issued in 2005 was to allow insurers to surcharge policyholders for catastrophic exposures that were not contemplated in the regular state workers compensation rate-making process. With the development of a separate endorsement (and rate) to address foreign terrorism (foreign terrorism premium endorsement WC 00 04 22), this endorsement was revised effective January 1, 2006, to charge the policyholder for the coverage of losses resulting from earthquakes, catastrophic industrial accidents, and "certain acts of domestic terrorism" (essentially those that fell outside the scope of TRIA or that were afforded coverage by the foreign terrorism premium endorsement).

The version of the endorsement that was effective September 1, 2008, reflected the changes necessitated by the passage of TRIPRA of 2007. Since TRIPRA of 2007 provided coverage for all certified acts of terrorism and made no geographic distinction between foreign and domestic losses, this endorsement was revised to afford coverage for catastrophic losses including noncertified acts of terrorism while clearly stating that no coverage (or premium charge) was included for certified acts of terrorism backstopped by TRIA and provided coverage by the Terrorism Risk Insurance Program Reauthorization Act Disclosure Endorsement (WC 00 04 22 B).

The current endorsement, effective January 1, 2015, is unchanged except for an amendment to update the reference to the Terrorism Risk Insurance Program Reauthorization Act Disclosure Endorsement (WC 00 04 22 B) contained in the form.

Broad Form Named Insured Endorsement

Some energy companies have many subsidiaries and sister companies. Forgetting to name even one of these companies as an insured could lead to uninsured workers compensation or employers liability claims. To reduce the possibility of this occurring, it is fairly common to attach a broad form named insured endorsement. A broad form named insured endorsement provides automatic coverage to a host of related entities. For example, the endorsement might cause the policy to automatically cover all subsidiary, affiliated, associated, controlled, or allied companies, corporations, or firms for which the company has responsibility for placing insurance. Of course, underwriters must be cautious about using this endorsement to assure that they are aware of all the risks they are covering under the policy and are properly charging for them. There is no standard NCCI endorsement of this type, but most commercial insurers have one or more of their own that can be used.

Modified Notice of Injury Endorsement

The workers compensation policy states that the insured must notify the insurer at once if an injury occurs that might be covered under the policy. While the policy does not explain exactly what constitutes reporting "at once," it is certainly demanding fast action. The insurer is simply trying to secure the ability to quickly investigate the accident and take actions to mitigate the loss. While the consequences of the insured's failure to give timely notice of the injury to the insurer are not spelled out in the policy, it could void coverage; this is especially true if the insurer can show that it was prejudiced by the late notice.

Since the provision requires the insured to report all injuries that may be covered, the best approach is to report all employee injuries, making no judgments about whether a given injury is covered. It is also important to understand that this duty to report employee injuries to the insurer is separate and distinct from any injury reporting requirement imposed by a state workers compensation law or the Occupational Safety and Health Act (OSHA).

Since the employer cannot report injuries of which it has no knowledge, the requirement that injuries be reported “at once” raises the question of when the employer is considered to have knowledge of an injury. For example, if a supervisor is aware of an injury or potential injury but fails to report it (perhaps with the employee’s consent to avoid losing bonuses based on safety records) until it becomes evident that the employee will need medical treatment, is the insured guilty of breaching its notification requirement? To avoid disputes over this issue, the obligation to report an injury is sometimes modified to begin as soon as, but not before, a specified individual (such as a manager or the risk manager) is informed of the injury or potential injury. There is no standard NCCI endorsement of this type, but most commercial insurers have one or more of their own that can be used.

Extended Notice of Cancellation Endorsement

The conditions section of the workers compensation policy states that the insurer must give the insured 10 days’ written notice of policy cancellation. (Many states require longer notice, such as 30 days. In that case, the policy states that this provision is altered to comply with the state’s notice requirement.) The states vary on whether or not advance notice is required if the insurer decides not to renew the policy or intends to materially alter the policy. This may result in an inadequate amount of time to arrange coverage with another insurer, following cancellation or nonrenewal. An extended notice of cancellation endorsement can be used to require longer notice of cancellation, intent not to renew, or material change in the policy. A minimum of 60 days’ notice is generally needed to evaluate other insurance options; 90 days’ notice is even better for the insured. There is no standard NCCI endorsement of this type, but most commercial insurers have one or more of their own that can be used.

Chapter 4
The Workers Compensation Marketplace

Chapter Overview and Objectives

Employers subject to workers compensation laws secure the payment of benefits to injured employees in one of the following two ways.

- By purchasing workers compensation insurance
- By obtaining authorization from the state to self-insure

Most businesses comply with the law by purchasing workers compensation insurance. Individual self-insurance is allowed in nearly all states, but it is feasible only for large employers that have the financial resources to pay the mandated benefits directly to injured employees—and to convince regulators of their ability to do so. Group self-insurance gives smaller employers an alternative to workers compensation insurance in states where it is allowed but also subjects these businesses to a certain amount of risk.

On completion of this chapter you should be able to

1. recognize the mechanics of the workers compensation marketplace
2. and identify the options open to a given employer to fulfill the requirements of the workers compensation laws.

Workers Compensation Insurance Markets

Depending on the state(s), workers compensation insurance is available from the following sources.

- A monopolistic state fund
- The voluntary private market
- A competitive state fund organization
- A state residual market plan

Monopolistic State Funds

In North Dakota, Ohio, Washington, and Wyoming, employers are required to purchase workers compensation coverage through a state workers compensation insurance fund. These state funds are referred to as monopolistic state funds because the state fund is the only workers compensation insurer in these states. Puerto Rico and the U.S. Virgin Islands also have monopolistic state funds. Insurance companies are not involved in the workers compensation insurance systems in these jurisdictions. Since the monopolistic state fund insures all employers in the state (except those employers that can qualify as self-insurers in the three monopolistic state fund states that allow self-insurance), there are no separate residual market facilities in these states.

The Voluntary Private Market

In all but the four monopolistic states, businesses can purchase workers compensation insurance from insurance companies that are licensed to write workers compensation insurance in the state. Virtually all insurers that write other types of insurance for businesses (commercial property, commercial general liability, and commercial auto insurance, for example) also write workers compensation insurance.

However, there are instances when the insurance company that writes the other insurance coverage needed by the business is unwilling to provide the necessary workers compensation coverage. When the business in question presents unusual or high-risk loss exposures or has had poor workers compensation loss experience, such a response on the part of the insurer is probably to be expected.

Competitive State Funds

In the 19 states shown in Exhibit 4.1, employers have the option of purchasing workers compensation insurance from a competitive state fund organization, an insurance facility established and (initially at least) funded by the state that competes with insurance companies for workers compensation business in that state only. These competitive state fund organizations have been established in hopes of reducing the premiums businesses pay for workers compensation insurance.

Sometimes the competitive state fund is willing and able to provide coverage for a lower premium than the voluntary private marketplace. A possible drawback to purchasing coverage through a competitive state fund is that these funds are often unable to provide full coverage for an employer's obligations under other states' laws.

Exhibit 4.1
States with Competitive Workers Compensation Insurance Funds

California	Maine	Oklahoma
Colorado	Maryland	Oregon
Hawaii	Minnesota	Pennsylvania
Idaho	Missouri	Rhode Island
Kentucky	Montana	Texas
Louisiana	New Mexico	Utah
	New York	

Residual Market Plans

Employers that are unable to purchase workers compensation insurance in the voluntary private market can purchase it from the state residual market facility. In about two-thirds of the states that have competitive state fund organizations, the competitive state fund serves as the state's residual market facility. In these states, the state fund must offer coverage to all eligible employers who apply, and there is no separate residual market facility. In the majority of the remaining jurisdictions, the residual market facility is what is most often referred to as a state-assigned risk plan.

Assigned risk plans are state-mandated programs in which all insurers that write workers compensation insurance in the state must participate. The exact operation of these plans varies somewhat by state.

Alternatives to Insurance

Some employers can comply with state workers compensation insurance requirements by obtaining authorization to self-insure, either as an individual entity or as part of a self-insurance group. In general, this option is available only to relatively large corporations—particularly where individual self-insurance is concerned. However, group self-insurance may be a viable option for smaller employers provided they are willing and able to accept the risk of assessments to cover any costs in excess of the group's reinsurance coverage.

Individual Self-Insurance

Individual workers compensation self-insurance is permitted in all states except North Dakota and Wyoming, provided the employer meets the criteria applicable to prospective self-insurers. In general, the statutes require that the employer provide regulators with satisfactory proof of its ability to directly pay required benefits to injured workers.

Some states only allow employers whose standard workers compensation premium is above a specified dollar amount to qualify as self-insurers. In most states, self-insurers must file securities with regulators as a guarantee of their ability to meet their obligations. To limit their liability to a specified amount, many states also require self-insurers to purchase excess insurance or reinsurance.

Group Self-Insurance

Group self-insurance (where individual employers combine to insure the workers compensation exposures of all of group members) is currently allowed in the 39 states listed in Exhibit 4.2. Eligibility requirements vary from state to state. Some states require groups to have a total standard workers compensation premium of a specified amount. Many also require group members to be in the same or a related industry. All require prospective self-insurance groups to submit a plan of operation to regulators for approval. In addition, groups can only operate in a single state and can only insure workers compensation exposures.

Although workers compensation self-insurance groups make the advantages of self-insurance available to smaller businesses, there are disadvantages as well. One disadvantage is that it subjects members to the risk of assessments for amounts not covered by the group's reinsurance.

Exhibit 4.2 States Allowing Self-Insured Groups for Workers Compensation		
Alabama	Kentucky	New Mexico
Arizona	Louisiana	New York
Arkansas	Maine	North Carolina
California	Maryland	Oklahoma
Colorado	Massachusetts	Oregon
Connecticut	Michigan	Pennsylvania
Delaware	Minnesota	Rhode Island
Florida	Mississippi	South Carolina
Georgia	Missouri	Tennessee
Hawaii	Montana	Texas
Illinois	Nevada	Vermont
Iowa	New Hampshire	Virginia
Kansas	New Jersey*	Washington**

** Group for municipalities, school boards, hospitals, and community colleges only*
*** Group for school districts and not-for-profit hospitals only*

Chapter 5
Federal Workers Compensation Laws for Maritime

Chapter Overview and Objectives

There are several federal workers compensation and employers liability laws that require employers to provide compensation to their injured workers. Unendorsed, the 2015 National Council on Compensation Insurance (NCCI) workers compensation and employers liability policy does not provide coverage for liability imposed by federal law. Thus, endorsements are required to provide coverage for liability imposed by a federal workers compensation or employers liability law under a standard workers compensation and employers liability policy.

This chapter examines the federal workers compensation laws of special importance to the energy industry and explains how insurance coverage for the resulting exposures may apply. These laws are listed in Exhibit 5.1.

Exhibit 5.1 **Federal Workers Compensation Laws**
1. **Longshore and Harbor Workers' Compensation Act (LHWCA)**—Provides no-fault workers compensation benefits to employees other than seamen (i.e., masters or crew members of a vessel) injured in maritime employment—generally, in loading, unloading, repairing, or building a vessel. 2. **Outer Continental Shelf Lands Act (OCSLA)**—Provides a compensation remedy to workers who are injured or killed while engaged in mineral exploration or development on the Outer Continental Shelf or on fixed structures (such as oil and gas production platforms) erected on the Outer Continental Shelf. It does so by making the Longshore Act applicable to nonseaman employees working in exploration, development, and extraction of natural resources on the Outer Continental Shelf. These workers rarely qualify as seamen because they are employed on nonvessel fixed structures, which are considered islands subject to shore-based principles or law rather than on vessels.

There is another federal workers compensation law that pertains to the energy industry that will not be discussed in this chapter because it is self-insured by the U.S. government and applies only to employees and former employees of the Department of Energy and its contractors and U.S. contractors. **The Energy Employees Occupational Illness Compensation Program (EEOICP) Act p**rovides compensation and the payment of medical expenses to employees and former employees of the Energy Department, its contractors and subcontractors, or to their survivors in certain instances when the individual is deemed eligible under the Act. The thrust of the Act is to compensate those workers who have become ill as a result of being exposed to radiation, beryllium, or silica or, in some cases, uranium, while working in nuclear weapon production.

The federal employers liability laws will be discussed in Chapter 6.

On completion of this chapter you should be able to

1. recognize the workers compensation exposures many energy companies face because of the Longshore and Harbor Workers' Compensation Act, Defense Base Act, and the Outer Continental Shelf Lands Act;
2. identify ways of insuring the exposures created because of the foregoing acts; and
3. recognize the scope of coverage provided by the Longshore and Harbor Workers' Compensation Act coverage endorsement to an energy company's workers compensation policy.

Longshore and Harbor Workers' Compensation Act (LHWCA) Including Outer Continental Shelf Lands Act (OCSLA)

The LHWCA provides a no-fault compensation remedy, in lieu of the common law remedy of damages, to employees *other than* members of the crew of a vessel (they qualify as "seamen") who are injured or suffer an occupational disease while engaged in maritime employment on navigable waters.[1] It preempts state workers compensation and provides substantially higher federal benefits.

The *Outer Continental Shelf Lands Act (OCSLA)*[2] provides a compensation remedy to workers who are injured or killed while engaged in mineral exploration or development on the Outer Continental Shelf or on fixed structures (such as oil and gas production platforms) erected on the Outer Continental Shelf. It does so by making the Longshore Act applicable to nonseaman employees working in exploration, development, and extraction of natural resources on the Outer Continental Shelf. These workers rarely qualify as seamen because they are employed on nonvessel fixed structures, which are considered islands subject to shore-based principles or law rather than on vessels.

History of LHWCA

Employees working on or near navigable waters who are not seamen are outside the scope of state compensation laws. Therefore, in 1927 the LHWCA was passed to provide uniform coverage for all work-related injury, disability, and death of employees (other than master and members of the crew) occurring upon the navigable waters of the United States (also applicable to dry docks if recovery is not provided under state law).

Litigation involving the federal Act has focused primarily on coverage, in an attempt to delineate the boundaries between federal and state jurisdictions over workers injured on or near navigable waters. Coverage has steadily expanded under judicial interpretation since the original enactment. This expansion received further impetus in 1972 when the LHWCA was first amended to provide coverage to certain shore-based workers. In 1984 the Act was amended again, in part to check the steady trend of expanding coverage. The 1984 amendments also changed the title of the federal compensation Act to the “Longshore and Harbor Workers’ Compensation Act.”

The latest amendments in 2009 related to work on recreational vessels. Prior to 2009, workers who repaired or dismantled recreational vessels fewer than 65 feet in length were excluded from LHWCA coverage if a state workers compensation program covered them. These rules became effective January 30, 2012.

History of OCSLA

With the advent of offshore oil exploration off the coast of the United States, a contest for dominion and control of the subsoil and mineral resources beneath the coastal waters of the United States surfaced between the U.S. government and several of the states. The U.S. Congress resolved this controversy by passing the Submerged Lands Act and the Outer Continental Shelf Lands Act.

The Submerged Lands Act confirmed to the states the ownership of the lands and natural resources beneath the navigable waters within 3 nautical miles off their respective coastlines. Specific exceptions were made for Texas and Florida, whose territorial seaward boundaries at the time of their admission into the United States had been 10 nautical miles. The authority of the states to apply their laws to fixed platforms located within their territorial seaward boundaries was left intact.

The Outer Continental Shelf Lands Act (OCSLA) made the laws and jurisdiction of the United States applicable to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures erected on the shelf to explore for natural resources.

Covered Employees

As amended, the LHWCA currently applies to any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations. It also applies to any harbor worker, including a ship repairman, shipbuilder, or shipbreaker, whose employer is engaged in maritime activity, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or adjoining area customarily used by such employer in loading, unloading, repairing, dismantling, or building a vessel).

The U.S. Supreme Court has decided that the “maritime employment” requirement is met if the injured worker establishes that the injury occurred on actual navigable waters. If so, the worker need not prove that the employment possessed a direct or substantial relation to navigation or commerce.

Waters are “navigable” when they are used or are susceptible to being used in their ordinary condition as highways for commerce. “Navigable waters of the United States” include those that form in their ordinary condition by themselves, or by uniting with other waters, a continuous highway over which commerce is or may be carried on with other states or foreign countries. Most waters are navigable for Longshore Act purposes because the location of a work activity on or near water is usually due to the commercial benefit of the waterway. Consequently, the navigability of waterways is seldom an issue on which coverage hinges.

The Act does not apply to a master or member of a crew of any vessel (who qualifies as a “seaman”) or to any person hired by the master to load, unload, or repair any vessel under 18 tons, or to any officers or employees of the United States or foreign governments. Nor does the Act apply to the following employees, provided they are covered under a state workers compensation law.

- Office clerical, secretarial, security, or data processing workers
- Employees of a club, camp, recreational operation, restaurant, museum, or retail outlet
- Marina employees who are not engaged in construction, replacement, or expansion of the marina, except for routine maintenance
- Individuals employed by suppliers, transporters, or vendors, temporarily doing business on the premises of an employer and not engaged in work normally performed by employees of that employer
- Aquaculture workers
- Individuals employed to build, repair, or dismantle recreational vessels of any length

A final class of workers excluded consists of employees of facilities that are certified as exclusively engaging in the business of building, repairing, or dismantling small vessels. “Small vessels” are defined as commercial barges under 900 lightship displacement tons or commercial tugboats, towboats, crew boats, supply boats, fishing vessels, or other work vessels under 1,600 tons gross. However, these workers are not excluded from coverage under the Act if any of the following apply.

- The injury occurs upon navigable waters or on any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or dry-docking vessels.
- The facilities receive federal maritime subsidies.
- The employee is not covered by a state workers compensation law.

In addition, OCSLA makes the Longshore Act applicable to any nonseaman employee who is employed in operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline natural resources. The Act does not apply to nonseamen working on fixed platforms within state territorial boundaries unless they are engaged in traditional maritime employment, such as the loading and unloading of vessels. The Act has also been applied to workers injured on waters outside the territorial limits of the United States.

In January 2012, the U.S. Supreme Court considered whether OCSLA requires the injury to actually occur on the Outer Continental Shelf to be covered by the Longshore Act. The Court determined it does not. Rather, the Court adopted a test that requires that an injured worker establish a “substantial nexus” between the injury and the covered extraction operations on the shelf. This ruling expanded the jurisdiction of OCSLA. Employers engaged in covered activities now have shoreside OCSLA exposure that did not exist prior to this ruling. The Supreme Court offered little guidance on the meaning of “substantial nexus,” instead leaving this to the administrative law judges and courts.

Key Applicability Issues

The 1972 legislation provided for a two-tiered status and situs test as a prerequisite to obtaining the favorable Longshore Act benefits. Longshore Act “situs” requires that the accident occur “upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area that is customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).” Activities upon navigable waters of the United States are unquestionably within Longshore Act situs. In addition, courts have been quite liberal in interpreting “adjoining area customarily used” to include areas that are sometimes, but not exclusively, used for loading, unloading, repairing, dismantling, or building a vessel. “Adjoining” does not necessarily mean “contiguous to” or “bordering.” All that is required is that the area be close to or in the vicinity of navigable waters.

For example, it has been held that rooms used for the storage and maintenance of longshoremen’s gear located five blocks from the gate of the nearest dock were within Longshore Act situs. Other examples include buildings ranging from 1,000 to 2,000 feet from the nearest navigable waters and a maintenance and storage building located 1 mile from the main harbor terminal.

This expansive view and liberal interpretation of the courts can be explained, in part, by the fact that Congress sought to eliminate the situation in which a potential claimant under the Act would be traveling in and out of Longshore Act jurisdiction during the regular performance of employment duties. For example, a shipyard worker might be covered while on the vessel being constructed but not when in the warehouse housing his or her tools located away from the vessel.

“Status” under the Act requires that the worker be engaged in “maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker.” Status also refers to employers, but the Act’s definition of “maritime employer” is not very revealing. It states, “The term ‘employer’ means an employer any of whose employees are employed in maritime employment, in whole or in part....” Unfortunately, this broad definition leaves a lot of room for interpretation and an employer may not realize that he or she employs “maritime employees” and is, therefore, a “maritime employer” until after an incident occurs.

The key to understanding Longshore Act status is a clear understanding of “maritime employment.” However, since this phrase was coined by Congress in 1972, no trustworthy definition has been found. The courts appear content to rule on particular classes of individuals on a case-by-case basis. However, some practical observations can be made regarding the types of workers who may fall within the Act’s jurisdiction.

- Employees expressly delineated in the Act as maritime employees, such as longshoremen, ship repairmen, shipbuilders, shipbreakers, and harbor workers, will normally be granted Longshore Act coverage since they customarily perform their job activities on or near navigable waters.
- Many workers whose employment is not ordinarily associated with maritime matters, such as carpenters, truck drivers, crane operators, computer operators, welders, and laborers, are potential maritime employees when performing these duties near navigable waters or shipping facilities, especially if they are regularly and routinely assigned to that area. In other words, the nearer and more often an employee frequents a shoreside area, the more likely he or she is to be granted Longshore Act status.
- Although some lower court decisions contain language to the effect that workers who, through transience or mere fortuity, are injured upon actual navigable waters will not gain status, if an injured employee ends up wet or is injured upon a floating structure, it should be anticipated that Longshore Act benefits are due. The Supreme Court has expressly reserved the issue of whether the LHWCA applies to a worker injured while “transiently or fortuitously” upon navigable waters, although it noted in passing a “substantial difference between a worker performing a set of tasks requiring the worker to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work.”

Clearly, the issue is highly fact-specific and subject to varied interpretation. In contrasting examples, a lower court affirmed that a worker who spent 40 percent of his work time on shore, 30 percent on fixed platforms, and 30 percent on oil exploration and production vessels was engaged in maritime employment because he was injured while on actual navigable waters, in the course of his employment. Yet, the same court found no coverage under the LHWCA for a mechanic performing all of his work duties on navigable waters because he was simply transported to and from his workstation—a stationary platform—by boat.

Interconnection between LHWCA and State Workers Compensation Systems

For certain types of workers, the 1984 amendments provide coverage only if no state system does. However, there still remain numerous types of workers engaged in amphibious operations who have the choice of pursuing either state or federal compensation remedies, depending upon the relevant state statutes. Longshore benefits that are not “scheduled injuries” can offer benefits for life, making them more attractive to an injured worker. Additionally, the maximum weekly benefits of state compensation systems are less than those of the Act. Therefore, if given the choice, most injured workers will attempt to place themselves under the LHWCA over a state system. But jurisdiction is concurrent.

With little room for exception, workers injured on actual navigable waters can successfully claim under the LHWCA. If the employment can be deemed "maritime but local," these same claimants may opt for state compensation rights. In support of reciprocity, state compensation systems generally extend coverage to land-based workers who are also, by their status as maritime employees, entitled to LHWCA benefits.

Workers injured on fixed platforms who are exploring for, developing, removing, or transporting resources on the Outer Continental Shelf are entitled to LHWCA remedies by incorporation through OCSLA, as discussed earlier. OCSLA provides LHWCA remedies to these workers regardless of their status or situs. In addition, these workers may have a choice under the law of the adjacent state to pursue rights under the state compensation system. Compensation jurisdiction (state and federal) on fixed platforms on the Outer Continental Shelf or shore areas adjoining navigable waters is, therefore, concurrent rather than exclusive.

Considerable overlap and possible conflicts exist between the workers compensation acts and the Longshore Act. Not only have the state workers compensation acts been applied to workers on fixed platforms in state territorial waters, but the LHWCA has also provided coverage to these same workers who satisfy the situs and status tests. Similarly, although the LHWCA has traditionally been applied as the exclusive remedy for a nonseaman injured on the Outer Continental Shelf, some states (Louisiana, for example) have extended the state workers compensation act to workers injured on fixed platforms on the Outer Continental Shelf. Employers of maritime workers must, therefore, insure both under the LHWCA and the state workers compensation acts to fully protect themselves against ever-increasing liabilities in this uncertain area of the law.

Covered Injuries and Diseases

The LHWCA covers any accidental death or injury occurring within the course and scope of employment within the jurisdictions to which the law applies. Injuries caused by the willful act of a third person directed against an employee because of his or her employment are also covered, as are such occupational diseases or infections as arise naturally out of such employment or as the natural or unavoidable results of such accidental injury.

Injury or death occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or herself or another is not compensable.

Benefits

Benefits under LHWCA include the following.

- Medical services and supplies
- Disability (permanent total, temporary total, permanent partial, and temporary partial)
- Death benefits

Payment for medical services and supplies is required for such period as the nature of the injury or the process of recovery may require.

Disability benefits are paid according to (1) whether the injury is partial or total and (2) whether the injury is scheduled or nonscheduled.

Total disability benefits are recoverable if the claimant shows that he or she is physically unable to do the type of work that he or she was formerly doing. An employer who wishes to counter such an allegation must do so by establishing that actual jobs are available to the claimant.

Total disability can be either temporary or permanent. Temporary total disability occurs, for example, during a recovery period from a surgery during which time the employee is unable to return to work temporarily but is expected to return to some level of work following recovery. Permanent total disability occurs when even after recovery and reaching maximum medical improvement, the injured employee remains unable to return to any type of work.

Compensation benefits for total disability are 66 2/3 percent of the employee's average weekly wage. For cases of partial disability, the employee is entitled to 66 2/3 percent of the difference between the employee's average weekly wages and wage-earning capacity thereafter. The maximum benefit an employee would be entitled to is 200 percent of the national average weekly wage. The minimum benefit payable for total disability is 50 percent of the national average weekly wage.

Once an injured employee reaches maximum medical improvement, he or she can return to work if the injury was temporary. But if the injury resulted in either partial or total permanent disability, the employee is entitled to additional payments. If the disability was scheduled (i.e., loss of an eye, disability to the leg, or loss of digits to a hand), the total unpaid portion of the award is paid based on a schedule found in the Act and weekly disability payments are made based on the number of weeks specified on the schedule. If the injury was unscheduled, the benefits are paid for life based on the loss of earning capacity.

Under the 1984 amendments to the Act, death benefits are not payable to the employee's beneficiaries if the death was not caused by a covered injury. If, however, the employee's death is caused by a covered injury, death benefits will be paid to the beneficiaries as follows.

- Funeral expenses not exceeding $3,000
- 50 percent of the employee's average weekly wage to the surviving spouse
- An additional 16 2/3 percent if the decedent leaves children

If the surviving spouse remarries, a lump sum payment equal to 2 years' compensation is made and the benefits cease. Also, if the surviving spouse remarries or dies, the percentages of the average weekly wage available to the other surviving dependents change. A different arrangement of percentages exists for children, dependent grandchildren, parents, and collaterals under various other circumstances. The total percentages payable, however, do not exceed 66 2/3 percent of the average weekly wage. The maximum weekly death benefits payable are also limited to 200 percent of the national weekly wage, not to exceed the actual weekly wage of the deceased.

Provision is also made for payment of benefits when the employee suffers a second injury increasing his or her disability. In this instance, the Second Injury Fund may assist the employer in paying the disability portion of benefits, while the employer remains responsible for medical payments. Additionally, provision is made for compensation to employees during the time that they are undergoing vocational rehabilitation.

LHWCA Claims

The following individuals can bring a claim under the Longshore and Harbor Workers' Compensation Act.

- An injured employee
- The employee's surviving dependent spouse
- Surviving children of the employee, as follows: any child under 18 years of age, any wholly dependent disabled child over 18, and any child under 23 who is a full-time student at a recognized school and who has not yet completed 4 years of education beyond the high school level
- Dependent parents of the employee

The claim can be brought against the immediate employer or a borrowing employer. In the event that the immediate employer defaults on its obligation to secure compensation, benefits are recoverable from the general contractor of the employer and its compensation insurer.

The U.S. Department of Labor has the authority to govern the disposition of claims arising under the Longshore and Harbor Workers' Compensation Act. Claims are administered by deputy commissioners appointed for the various compensation districts, and controverted claims are adjudicated by federal administrative law judges. Appeals from administrative law judge decisions are reviewed by the Benefits

Review Board and finally by the federal court of appeals having jurisdiction over the compensation district involved. Review by the U.S. Supreme Court may also be available.

Time Limitations on Filing Claims

A claim must be filed within 1 year after the injury or death. In the instance of occupational disease causing delayed death or disability, the claim must be filed within 2 years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within 1 year after the date of the last payment.

The time for filing a claim does not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. In some instances, the failure of the employer to report a known accident extends the time for filing of the claim.

Claims Settlement Procedures

There are procedures for administrative approval of proposed settlement agreements in the Act and its accompanying regulations. Approval of such settlements is discretionary with the deputy commissioner and may include compensation benefits, death benefits, and future medical expenses. Settlements may also be approved after entry of a final compensation order. Such settlement proposal must be submitted to the deputy commissioner or the administrative law judge, who will approve it within 30 days, unless it is found to be inadequate or procured by duress. If the parties are represented by counsel, settlements submitted to the deputy commissioner will be deemed approved unless specifically disapproved within 30 days of submission of the settlement. A claim cannot be otherwise withdrawn without the approval of the deputy commissioner or the administrative law judge.

Insurance Requirements and Penalties

The Act stipulates that employers who are subject to the Act must secure payment of benefits, either by purchasing insurance or by obtaining authorization from the U.S. Secretary of Labor to self-insure. An employer who fails to secure compensation is subject to both a civil action for damages, in which it may not plead the defenses of contributory negligence or assumption of the risk, and a criminal misdemeanor charge, for which its corporate officers are severally liable. Finally, the officers are jointly liable for any benefits under the Act that the corporation has failed to secure.

Medicare Set-Asides and Secondary Payer Act

Settlements under the LHWCA are subject to Medicare set-aside requirements. The reach of the Medicare, Medicaid, and SCHIP Extension Act of 2007 is too extensive for a full discussion here; however, following are a few key points of which to be aware.

- The minimum criteria needed for a Longshore claim to require review by a Center for Medicare and Medicaid Services (CMS) are (1) the claimant is currently eligible for Medicare and the total value of the settlement exceeds $25,000, or (2) the claimant is reasonably expected to become eligible for Medicare within 30 months of a settlement and the value of the settlement is $250,000 or more. (The "value" of a settlement includes past and future medical costs, indemnity, attorneys' fees and costs, and Medicare overpayments.)
- Insurers and self-insured entities are required to report claims made by Medicare-eligible claimants to CMS. Nonreporting can result in significant penalties. However, there may be clarifications of this requirement and its application in years to come.
- Risk managers should be aware that settlements with a claimant who is or can soon be Medicare-eligible will have some potential difficulties and delays with set-asides and reporting requirements. A settlement can be approved subject to the set-aside being funded only after CMS approval of the set-aside, but this will delay final resolution.

Suits Against Third Parties under the Longshore Act

Under Section 905(b) of the Act, employees entitled to compensation can also sue third parties for damage caused by their fault or negligence. Such third parties include vessels on which the employees may be working; however, the vessel does not owe a warranty of seaworthiness to such employees.

If the injured person was employed to provide shipbuilding, repairing, or breaking services, and the person's employer was also the owner or charterer of the vessel, no third-party action is permitted against the employer in its capacity as the vessel's owner or charterer.

The standard of care in a negligence action has been redefined by the U.S. Supreme Court. The standard was defined in terms of the stevedore-vessel owner's relationship during cargo operations. At the present time, it appears that a duty is imposed on the vessel owner to, at least, warn the stevedore of any dangerous condition existing at the outset of the stevedoring operations of which the vessel owner should have been aware through the exercise of reasonable care.

Contracts of indemnity whereby the vessel seeks indemnity from the employer are unenforceable unless the injured employee was receiving benefits under the Act by virtue of Section 4 of OSCLA. In that event, the vessel may enforce any reciprocal indemnity obligation whereby the employer and the vessel agree to defend and indemnify the other for injury to or death of their respective employees.

If a third party is responsible for the injury, the employer is entitled to recover the amount of compensation paid. Acceptance of compensation payments by the claimant creates a lien against the funds recovered by the claimant from third parties.

Settlement between the employee and third parties without the written approval of the employer terminates the employer's obligation for future compensation benefits. The U.S. Supreme Court has held that this provision of the Act is absolute. Settlement with written approval of the employer reduces the employer's future compensation obligation by the net proceeds received by the claimant in the settlement.

Suits Against Third Parties under OCSLA

Under OCSLA, the exclusive remedy of covered fixed platform workers or their survivors against employers is the statutory compensation benefits provided by the Longshore Act. However, injured workers (and any other persons designated by the law of the adjacent state) may bring an action against third parties for deaths or injuries that occur on fixed platforms on the Outer Continental Shelf. The claim can be brought against any nonemploying person, corporation, and/or vessel committing the tort.

Due to the absence of a federal common law of the United States, a personal injury or wrongful death action involving events occurring on fixed platforms located on the Outer Continental Shelf is governed by federal law, and the law of the adjacent state is applied as surrogate federal law. It was originally thought that the general maritime law of the United States would be applied to fixed platforms erected on the Outer Continental Shelf for the purpose of exploring and producing natural resources. However, it is now well settled that these platforms are to be considered artificial islands that are not governed by maritime law.

Tort actions brought by workers on fixed platforms located on the Outer Continental Shelf may be brought in federal court, under the Outer Continental Shelf Lands Act or diversity of citizenship jurisdiction, or in state court. In either case, trial by jury is permitted. Tort actions brought by workers on fixed platforms located within the state's territorial seaward boundaries may be brought in state court or in federal court under diversity of citizenship jurisdiction. In either case, trial by jury is permitted.

How To Insure LHWCA Exposures

Because standard workers compensation policies do not automatically provide coverage, LHWCA exposure requires specific treatment. Coverage can be provided by adding a Longshore and Harbor Workers' Compensation Act coverage endorsement (WC 00 01 06 A) to a standard workers compensation policy, by purchasing stand-alone coverage from a federally authorized insurer, or by becoming an approved self-insurer.

How To Insure OCSLA Exposures

Because standard workers compensation policies do not automatically provide coverage, OCSLA exposure requires specific treatment. Coverage can be provided by adding an Outer Continental Shelf Lands Act coverage endorsement (WC 00 01 09 C) to a standard workers compensation policy.

LHWCA Coverage Endorsement

The Longshore and Harbor Workers' Compensation Act coverage endorsement (WC 00 01 06 A) adds coverage for benefits owed under the LHWCA. The LHWCA provides medical, disability income, and survivorship benefits to eligible employees injured in maritime employment on the navigable waters of the United States and adjoining areas. Eligible employees generally include those involved in loading and unloading vessels and building, repairing, or dismantling vessels. Masters and crew members of a vessel are not covered by the Longshore Act.

The endorsement amends the definition of workers compensation law to include the Longshore and Harbor Workers' Compensation Act and any amendments to the Act in effect during the policy period. The endorsement also includes exclusionary language eliminating coverage for all other federal workers compensation laws and specifically stipulates that no coverage is provided for benefits owed under the Nonappropriated Fund Instrumentalities Act, the Defense Base Act, or the Outer Continental Shelf Lands Act. All three of these federal laws extend the LHWCA to apply to additional types of employees not otherwise eligible for benefits under the LHWCA. If coverage for liability imposed by any other federal workers compensation law is needed, it must be specifically added to the policy using the appropriate federal coverage endorsement.

The endorsement also makes exclusion 8 to the employers liability portion of the policy inapplicable to work that is subject to the LHWCA. Exclusion 8 to the employers liability section of the policy eliminates employers liability coverage for bodily injury to those engaged in work that is subject to a number of specified federal workers compensation acts, including the LHWCA. Here again, if coverage for liability imposed by any of these other federal laws is needed, it must be specifically added to the policy using the appropriate federal coverage endorsement.

The nature of an organization's business and its territorial scope, particularly in relation to operations at or about navigable waters, will impact how coverage is provided and the cost.

Known Exposure

When an organization has a known exposure, it either must purchase insurance, self-insure, or maintain a combination of the two; that is, retain a certain amount and add specific excess or aggregate excess where permissible. Because the conditions under which the LHWCA operates are not well defined, private insurers are often reluctant to offer coverage and other options such as specialty insurers, state funds, assigned risk plans, and voluntary pools may need to be considered.

Exposures must be carefully and completely described to underwriters to ensure that proper coverage is purchased.

No Known Exposure

Even a company that has no known exposures to the Act should still request that an LHWCA endorsement be attached to its workers compensation and employers liability policy. Then if an injured worker is found to be covered under the LHWCA, the employer will have insurance coverage and will avoid possible fines and/or jail terms. Many insurers are willing to attach this endorsement on an "if any" basis and for no charge or a minimal charge. If an exposure arises during the policy period, it will be discovered during the annual premium audit, and an additional premium will be charged based on the appropriate classification and rate. Some insurers may decline to add the endorsement.

Premium Rates

Rates are promulgated by the various workers compensation rating authorities. There are specific classifications (such as shipbuilding, ship repair, and stevedoring) that are defined as federal classifications and are designated by an "F" code after the four-digit classification number. For nonfederal classifications, work is classified in accordance with the workers compensation code applicable in the state of operations, and the state rate is modified by a percentage surcharge to obtain the LHWCA rate.

Supplemental coverages, such as required under the Defense Base Act and the Outer Continental Shelf Lands Act, are rated differently by each insurer and generally are not subject to approval by a rating authority.

Self-Insurance Requirements

Employers that wish to self-insure the exposure must first obtain permission from the U.S. Department of Labor's Office of Workers' Compensation Programs. An employer can apply to be authorized to self-insure provided it can show that it has the following.

1. Financial resources to meet all obligations under the Act
2. Adequate excess insurance
3. Adequate arrangements for prompt authorization of and payment for all necessary medical care
4. Made a security deposit as prescribed by the Office of Workers' Compensation Programs
5. Agreed to carry out all requirements of the Act

The authorization to self-insure is reviewed annually.

Penalties for Failure To Provide Coverage

If an employer fails to obtain LHWCA coverage, an injured worker or survivors may elect compensation under the Act or may file an action in civil court or under general maritime law. If such an action is filed, the employer cannot use the defenses of negligence of a coemployee, assumption of risk, or contributory negligence.

If an employer does not secure payment of compensation, the employer is guilty of a misdemeanor and is subject to a fine of up to $10,000, 1 year in prison, or both. If the employer is a corporation, the president, secretary, and treasurer are severally and personally liable for benefits and compensation due an employee under the law.

OCSLA Coverage Endorsement

The Outer Continental Shelf Lands Act endorsement (WC 00 01 09 C) adds coverage for benefits owed under the Outer Continental Shelf Lands Act. The Outer Continental Shelf Lands Act extends the benefits established in the Longshore and Harbor Workers' Compensation Act (LHWCA) to those employed in operations conducted on the Outer Continental Shelf of the United States for purposes of exploration, development, or removal of natural resources of the subsoil and seabed. The term "outer continental shelf" is very precisely defined in the Act, but a brief working definition might be submerged lands lying seaward of the boundaries of the various states that are subject to the jurisdiction of the United States.

The endorsement amends the definition of workers compensation law in the policy to include the Outer Continental Shelf Lands Act. Notice, however, that the exclusionary language applying to all other federal workers compensation laws remains. If coverage is needed for any other federal workers compensation law, it must be specifically added using the appropriate endorsement.

The endorsement also makes exclusion 8 to the employers liability portion of the policy inapplicable to work that is subject to the Outer Continental Shelf Lands Act. Exclusion 8 to the employers liability section of the policy eliminates employers liability coverage for bodily injury to those engaged in work that is subject to a number of specified federal workers compensation acts, including the Outer Continental Shelf Lands Act. Here again, if coverage for liability imposed by any of these other federal laws is needed, it must be specifically added to the policy using the appropriate federal coverage endorsement.

Chapter 6
Federal Employers Liability Laws for Maritime

Chapter Overview and Objectives

The federal workers compensation laws discussed so far are true workers compensation laws, in that they are no-fault laws in which the employee's right to sue under common law is forfeited in exchange for statutory payments for injury or death regardless of fault. However, there are other federal and maritime laws that establish a cause of action for certain employees (or their survivors) against their employer in case of injury or death.

Exhibit 6.1
Federal Employers Liability Laws

1. **General Maritime Law**—The common law of the sea holds that vessel owners owe "transportation, wages, maintenance, and cure" to masters or members of a crew of a vessel in the event of injury or illness during the voyage, regardless of whether the injury or illness is work related. Also, seamen can sue the vessel owner for damages resulting from the unseaworthiness of the ship.
2. **Death on the High Seas Act**—Establishes a cause of action for the death of *any person* (including but not limited to an employee killed on the job) occurring on the high seas more than 3 miles from the U.S. coast, if the death was caused by the unseaworthiness of a vessel or by the negligence (or strict liability) of a person or corporation.
3. **Merchant Marine Act of 1920 (the Jones Act)**—Provides *seamen* with a negligence remedy for on-the-job injury without having to overcome employer defenses of assumption of the risk or fellow servant liability. Contributory negligence of the employee does not bar recovery, but recovery is reduced by the proportion of negligence attributable to the employee.

As explained in this chapter, the availability of the various maritime remedies to any given claimant depends on various factual issues, such as

- whether the claimant is a seaman or a longshoreman;
- whether the equipment involved is a vessel or a nonvessel;
- whether the defendant is the employer, the vessel owner, a nonvessel owner, or a nonemployer third party; and
- whether the accident occurred on land, on a vessel, on a platform, or within or beyond state territorial waters.

Frequently, a single injury will involve multiple remedies, some of which may overlap or even conflict. Awareness of the interrelationship of these remedies is necessary to achieve the optimal resolution of the claim.

On completion of this chapter you should be able to

1. recognize the employers liability exposures many energy companies face because of the Jones Act, the Death on the High Seas Act, and maritime law;
2. identify the factors typically considered when determining seaman status and vessel in navigation status; and
3. identify ways of insuring the exposures created because of the foregoing acts.

Benefits Available to Seamen

Maritime law affords an abundance of federal remedies to workers injured while engaged in maritime activities. Employees other than members of the crew of a vessel who are injured while engaged in maritime employment are provided with a single no-fault compensation remedy, in lieu of the common law remedy of damages, under the Longshore and Harbor Workers' Compensation Act (LHWCA), which is discussed in Chapter 5. Employees qualifying as seamen, however, have several remedies available to them in the event of an employment-related injury or disease. These remedies can be divided into two groups, statutory remedies and general maritime law remedies, as shown in Exhibit 6.2.

Exhibit 6.2 Seamen's Remedies
Statutory Remedies
• Jones Act • Death on the High Seas Act
General Maritime Law Remedies
• Unseaworthiness • Wages, maintenance, and cure

Statutory Remedies

The Jones Act is perhaps the mostly widely recognized maritime remedy under American law. Unlike state workers compensation statutes, it entitles a *seaman* or his or her beneficiaries to sue his or her employer for negligence when he or she sustains personal injury or dies in the course of his or her employment.

The Death on the High Seas Act establishes a cause of action for the death of *any person* (including but not limited to an employee killed on the job) occurring on the high seas more than 3 miles from the U.S. coast, if the death was caused by the unseaworthiness of a vessel or by the negligence (or strict liability) of a person or a corporation.

General Maritime Law Remedies

In addition to these two statutory remedies, *seamen* may also be entitled to damages under two bases established by general maritime law.

- Unseaworthiness
- Wages, maintenance, and cure

It has long been recognized under general maritime law that the vessel owner has a nondelegable duty to furnish a seaworthy ship—one that is reasonably fit for its intended use. Accordingly, a *seaman* may pursue a claim against the vessel owner for damages caused by the unseaworthiness of the vessel. This remedy may be pursued in conjunction with the seaman's Jones Act claim even if the vessel owner is also the employer.

Similarly, the doctrine of maintenance and cure, the origin of which is rooted in the ancient sea codes, grants to a seaman who falls ill or is injured while in the service of the vessel the right to food and lodging (maintenance) and medical care (cure). This right begins when the seaman becomes incapacitated and continues until he or she reaches maximum medical recovery.

The discussion that follows provides an overview of the key aspects of each of these seamen's remedies but focuses particularly on the requirements that must be met for the seaman to have a valid claim. It will also indicate defenses to the claim for damages that may be available to the employer.

Jones Act[3]

The Jones Act was enacted in 1920 to provide a remedy for injury or death sustained by seamen or members of the crew of a vessel and caused by the negligence of the employer. To succeed on a Jones Act claim against his or her employer, a seaman must show that

(1) he or she is a seaman under the Act;

(2) he or she suffered an injury in the course of his or her employment;

(3) his or her employer was negligent; and

(4) his or her employer's negligence caused his or her injury at least in part.

Seaman Status

Only seamen may make a claim under the Jones Act. The worker in question must be a member of the vessel's crew rather than a land-based employee who happens to be working on the vessel at a given time. To qualify as a Jones Act seaman, an individual must have an employment-related connection to a vessel or identifiable fleet of *vessels in navigation*. However, the federal courts and juries have applied liberal interpretations of the term "seaman" to the extent that anyone who performs a significant part of his or her work aboard a vessel on navigable waters may qualify as a seaman, even such unlikely workers as a hairdresser, musician, bartender, cook, steward, diver, roustabout, welder, and various repairmen.

To further clarify which workers qualify under the Act, a second requirement is that a seaman must have a connection to a vessel (or identifiable fleet) in navigation that is substantial in terms of both its duration and its nature. So a worker who spends only a small fraction of his or her working time on board a vessel is fundamentally land based and, as such, is not a member of the vessel's crew, regardless of his or her duties. A rule of thumb is that a worker who spends less than about 30 percent of his or her time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.

Vessel in Navigation Status

Since an individual must have an employment-related connection to a vessel or identifiable fleet of vessels in navigation to qualify as a Jones Act seaman, it is crucial to determine what qualifies as a "vessel in navigation." The term "vessel" has been broadly defined to include any kind of watercraft or equipment capable of being used for transportation on navigable waters, regardless of its primary purpose or state of transit at a particular moment.

Movable drilling rigs, jack-up barges, drilling barges, and similar structures are deemed to be "vessels." However, fixed drilling platforms are not vessels. Structures such as spud barges and work pontoons are considered vessels if they serve a significant transportation function but not if their primary purpose is to provide a floating support for construction or other activities.[4]

Other Elements of the Jones Act Claim

There must be an employer-employee relationship between the seaman and the vessel owner, and the accident or injury must occur while the seaman is in the course and scope of that employment.

There must also be negligence on the part of the employer or its employees or agents. However, the negligence need not be a proximate cause of the injury in the traditional sense. A seaman may recover if the negligence played any role, even the slightest, in causing the injury or death.

To establish negligence by the employer, a Jones Act plaintiff must prove by a preponderance of the evidence that the employer breached a duty to protect against foreseeable risks of harm. An employer's duty under the Jones Act is to provide seamen with a safe place to work. This duty extends from the vessel to the shore, provided the seaman is acting in the course of his or her employment. Therefore, the location of the accident does not control whether a claim can be made under the Act. It can cover accidents on land if the other requisites are met.

Finally, the action must be brought by the injured seaman. Or, if the seaman has died, the action must be brought by the administrator/executor of the seaman's estate on behalf of the specified beneficiaries. Specified beneficiaries are, in order of preference, the surviving spouse and children, and if none, the seaman's parents, and if none, the next of kin dependent on the seaman.

The action for negligence under the Jones Act may be brought only against the seaman's employer. It may either be his or her direct (payroll) employer, a borrowing employer, or, in some instances, both. The employer need not be the owner of the vessel.

Suit may be brought in any federal or state court within the jurisdiction in which the employer engages in business activity. If the seaman selects the state forum, the defendant may not remove the case to federal court.

The Jones Act gives only the injured seaman or his or her personal representative the right to elect a jury trial; a Jones Act defendant does not have that option.

All Jones Act claims must be filed within 3 years of the accident that gave rise to the claim.

Defenses to the Jones Act Claim

Comparative negligence is a partial defense to a Jones Act claim. The contributing negligence of the seaman does not bar recovery completely, but it reduces the seaman's or the seaman's survivors' recovery by the percentage of the negligence attributable to him or her.

Another defense is the *primary duty rule*. The primary duty rule is a seldom-applied rule that provides that a seaman may not recover from his or her employer for injuries caused by his or her own failure to perform a duty imposed on him or her by his or her employment. This defense is commonly referred to as the Walker-Reinhart doctrine. Although the application of the defense is usually avoided, the defense may still be viable where the employer can show that the employee (1) was injured as a result of a breach of a duty that the employee consciously assumed as a term of employment; (2) created the dangerous condition or, in the proper exercise of employment duties, could have controlled or eliminated the dangerous condition; and (3) knowingly violated the duty consciously assumed as a term of employment.

The common law doctrine of voluntary assumption of a known risk is *not* a defense under the Jones Act.

Jones Act Damages

When a seaman is injured, he or she is entitled to recover all general and special damages attributable to the accident, including loss of past and future wages and fringe benefits, impairment of future earning capacity, medical expenses, pain, suffering, disability, and humiliation and mental anguish. Loss of consortium or society is not allowed to the spouse or children of an injured seaman under the Jones Act, and punitive damages are not recoverable.

In wrongful death actions under the Jones Act, recovery is limited to the financial loss sustained by the specified beneficiaries. Recovery may include the following.

- *Funeral expenses.*
- *Loss of support*—all financial contributions the decedent would have made to his or her dependents had the decedent lived.
- *Loss of services*—the monetary value of services the decedent provided and would have continued to provide but for his or her wrongful death. Such services include the nurture, training, education, and guidance that a child would have received had the parent not been wrongfully killed. Services the decedent performed at home or for his or her spouse are also compensable.
- *Survivorship claim*—seaman's lost wages during the period from the time of injury to date of death, as well as medical expenses and pain and suffering of the decedent before death.

Nonfinancial losses such as loss of love, affection, society, care, comfort, and companionship are not recoverable in a Jones Act negligence action.

How To Insure Jones Act Exposures

Unendorsed, the workers compensation and employers liability policy does not provide coverage for bodily injury to a master or crew member of any vessel. Employers can obtain coverage by purchasing a maritime coverage endorsement (WC 00 02 01 B) to a standard workers compensation policy. The endorsement is discussed later in the chapter.

Death on the High Seas Act

The *high seas* are those seas beyond 3 nautical miles from the shore of any state, territory, or dependency of the United States, and the territorial waters of a foreign nation. The Jones Act provides a remedy for the wrongful death of a seaman who is killed in territorial waters (less than 3 nautical miles from the shore of any state). The Death on the High Seas Act (DOHSA)[5] created a remedy for the wrongful deaths of not only seamen but also other individuals, occurring more than 3 nautical miles from the United States and its territories or dependencies.

The DOHSA remedy is not limited to seamen, nor is an employment relationship a prerequisite to this cause of action. Further, the provisions of DOHSA are not specifically limited to persons killed on vessels. Even a person killed in an aircraft accident on the high seas is entitled to recover under DOHSA.

Elements of the DOHSA Claim

A claim may be brought under DOHSA for a death caused either by the unseaworthiness of a vessel or the negligence or strict liability of a person or corporation or by both. In either case, the elements are the death of a seaman or other person on the high seas proximately caused by a wrongful act, neglect, or default that involves financial loss to the specified beneficiaries.

The action must be brought by the administrator/executor of a deceased person's estate for the benefit of the specified beneficiaries, which include the decedent's spouse, parents, children, and dependent relatives. The claim may be brought against any vessel *in rem*, person, or corporation responsible for the death and must be brought in federal court, and there is no right to a jury trial. The suit must be initiated within 3 years from the date of the wrongful act, neglect, or default.

Defenses to the DOHSA Claim

Comparative negligence is a partial defense to a DOHSA claim. The contributing negligence of the seaman does not bar recovery completely but it reduces the survivors' recovery by the percentage of the negligence attributable to him or her. Assumption of the risk is not a defense under DOHSA.

DOHSA Damages

Recovery available to the decedent's survivors is limited to the *financial* loss sustained by them, proportioned among them according to their respective loss. This includes both loss of support and loss of services. Loss of support includes all financial contributions the decedent would have made to his or her dependents had he or she lived. Loss of services encompasses the recovery for the monetary value of services the decedent provided and would have continued to provide but for his or her wrongful death. Such services include the nurture, training, education, and guidance that a child would have received had the parent not been wrongfully killed. Services the decedent performed at home or for his or her spouse are also compensable.

The survivors cannot recover for loss of society, consortium, and love and affection of the decedent, nor can survivors recover for lost wages during the period from the time of injury to time of death, medical expenses, and pain and suffering of the decedent prior to his or her death.

How To Insure DOHSA Exposures

Employers can obtain coverage by purchasing a maritime coverage endorsement (WC 00 02 01 B) to a standard workers compensation policy; the endorsement is discussed later in this chapter.

Unseaworthiness

Liability for unseaworthiness of the vessel is similar to strict liability. The breach of the warranty of seaworthiness gives rise to a claim that is separate from a claim for negligence under the Jones Act.

The owner or bareboat charterer of a vessel has an absolute and continuing duty that cannot be delegated to provide a seaworthy vessel. The warranty of seaworthiness had its origin in the ancient maritime codes and court decisions and is based on the general maritime law of the United States. The shipowner's warranty of seaworthiness is imposed to compensate for injuries or deaths resulting from vessels that are not reasonably fit for their intended use.

The warranty of seaworthiness extends to the ship's hull, gear, stowage, appurtenances, passageways, cargo, and even the crew. Examples of unseaworthy conditions include defective equipment, lack of proper lifesaving equipment, absence of bathroom facilities, inadequate lighting, improper stowage, unsafe means of boarding and departing a vessel, and unsafe or improper tools.

Elements of the Unseaworthiness Claim

A seaworthy vessel is one that is reasonably fit for its intended use. The warranty applies to a seaman. To achieve seaman status, (1) an employee's duties must contribute to the function of the vessel in navigation or to the accomplishment of its mission, and (2) a seaman must have a connection with a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

The injury must occur on a vessel in navigation. The determination of vessel status is the same as that in Jones Act cases. As noted earlier, movable drilling rigs, jack-up barges, drilling barges, and similar structures are considered vessels with respect to the Jones Act. The unseaworthy condition must be a proximate cause of the accident. If a death claim is involved, the accident must have occurred within 3 nautical miles of the United States or its territories or dependencies.

The action must be brought by the injured seaman. An injured Jones Act seaman's spouse and children cannot recover for loss of society or consortium through an unseaworthiness claim. Based on the 1972 amendments to the LHWCA, longshoremen and other personnel covered by that Act do not have the right to bring a claim for unseaworthiness.

Where the accident has resulted in death, the action must be brought by the administrator/executor of the estate on behalf of certain beneficiaries. While the classification of these beneficiaries is not definitively specified, it is generally suggested that the beneficiaries must be financially dependent upon the deceased seaman.

An unseaworthiness claim may be brought against the vessel *in rem* and its owner and bareboat charterer in personam. Suit may be brought in any federal or state court within the jurisdiction where the owner or bareboat charterer engages in business activity. However, an *in rem* claim against a vessel for unseaworthiness may be brought only in federal court. Regardless, there is no right to a jury trial in federal court unless the unseaworthiness claim is coupled with a Jones Act claim or brought under the court's diversity of citizenship jurisdiction.

A general maritime lawsuit for unseaworthiness must be filed within 3 years from the date that death or injury occurs.

Defenses to the Unseaworthiness Action

Comparative negligence is a partial defense to a general maritime law action for unseaworthiness. The contributory negligence of the injured or deceased party reduces recovery to that party or that party's survivors by the percentage of the negligence attributable to the injured or deceased, but it does not bar recovery completely.

The primary duty rule also serves as a defense with respect to unseaworthiness claims. The defense here is the same as in Jones Act cases.

Operational negligence also may serve as a defense to an unseaworthiness claim. The fact that someone acts negligently or misuses vessel equipment and causes an injury does not mean that the vessel itself is unseaworthy. An accident resulting from operational negligence that does not create a permanent or temporary condition is not a basis for action as a breach of the warranty of seaworthiness.

However, temporary conditions on a vessel can make the vessel unseaworthy. Since liability is imposed without regard to fault, neither lack of knowledge nor lack of control over the condition is a defense. Similarly, the common law doctrine of voluntary assumption of a known risk is not a defense under the general maritime law.

Unseaworthiness Damages

The damages recoverable in an unseaworthiness action are the same as those recoverable under the Jones

Act. However, there can be no double recovery.

How To Insure Seaworthiness Exposures

Employers can obtain coverage by purchasing a maritime coverage endorsement (WC 00 02 01 B) to a standard workers compensation policy.

Wages, Maintenance, and Cure

A seaman's right to wages, maintenance, and cure is implicit in the contractual relationship between the seaman and the seaman's employer. The right is designed to insure recovery by a seaman who is injured or falls ill in the service of the vessel, regardless of fault, and is intended to compensate the seaman for wages until the end of the voyage (wages), the value of the seaman's room and board while aboard the vessel (maintenance), and necessary medical expenses (cure).

Wages, maintenance, and cure is sometimes compared to workers compensation, but the only similarities are that both are based on the employment relationship and both are owed whether or not the employer was at fault. In some respects, the shipowner's liability is more extensive than liability under any workers compensation act because a seaman need only be accountable to the call of duty rather than actively engaged in the performance of shipboard duties at the time the illness or injury occurs.

In addition, while workers compensation affords a remedy to land-based workers against their employers in place of a tort action, the right to wages, maintenance, and cure is not the seaman's exclusive remedy against his or her employer. A seaman may also recover damages for negligence under the Jones Act and for breach of the duty to provide a seaworthy vessel.

Elements of the Wages, Maintenance, and Cure Claim

The obligation to pay wages, maintenance, and cure is a form of liability without fault that arises without regard to the negligence of the employer or the unseaworthiness of the vessel. In addition, the law provides that wages, maintenance, and cure benefits are not diminished by the sole or contributory negligence of the injured seaman.

The incident giving rise to the injury must occur while the seaman is "in the service of the vessel" as distinguished from "in the course of employment." So presence on the vessel is not necessarily required. For example, maintenance and cure benefits have been granted to seamen who were injured or fell ill while on shore leave.

A seaman may bring an action for wages, maintenance, and cure either against his or her employer in personam or against the vessel *in rem*. Suit may be brought against the vessel even though the vessel owner is not the seaman's employer.

A claim for wages, maintenance, and cure against the employer under the general maritime law may be brought in any federal or state court where the employer conducts business activities. If brought against the vessel *in rem*, the action may be brought only in federal court.

If brought as the sole cause of action in federal court under the admiralty jurisdiction of the court, trial by jury is not permitted. However, a claim for wages, maintenance, and cure is generally coupled with a claim under the Jones Act, and, as such, may be tried before a jury.

Defenses to the Wages, Maintenance, and Cure Claim

Delay in asserting a claim serves as a defense, although a mere delay in asserting a maritime claim does not bar the claim unless the delay is unreasonable and the party against whom it is asserted is unduly prejudiced. If the delay defense is applicable, the burden of proof to establish lack of prejudice and excusable delay shifts to the plaintiff.

Gross intoxication may be a defense if a seaman's gross intoxication is the sole cause of his or her injury or if it is demonstrated to be willful and wanton misconduct. The court will usually deny maintenance and cure benefits on the grounds of willful misconduct and fighting if the seaman is the aggressor.

Usually the courts will allow a seaman whose illness preexisted his or her employment to recover maintenance and cure benefits if the illness manifests itself while the seaman is in the service of the vessel. However, where a seaman consciously conceals from his or her employer a prior known disability, the disclosure of which is plainly desired, the courts will usually deny maintenance and cure benefits.

To recover maintenance and cure, the seaman must show actual expenditures. One who does not pay his or her own living expenses, such as a seaman living at home with his or her parents, cannot recover maintenance benefits from the seaman's employer.

Wages, Maintenance, and Cure Benefits

Wages, maintenance, and cure provides seamen three basic entitlements, which are as follows.

- Wages to the end of the voyage
- A per diem living allowance for the period that the seaman is outside the hospital but has not reached the point of maximum cure, that is, the point beyond which further medical treatment will not improve his or her condition
- The payment of therapeutic, medical, and hospital expenses (prosthesis, etc.) until the seaman reaches the point of maximum medical recovery

Maintenance rate is an amount equal to the reasonable cost in the area where the seaman resides of meals and lodging of the same quality as those that were furnished to the seaman while he or she was working aboard the vessel.

The courts have determined that it is appropriate to declare that a point of maximum medical recovery has been achieved where it appears that the seaman's condition is incurable, or that future treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition.

Under maintenance and cure, a seaman may also be entitled to "found." *Found* is the value of food and lodging that a seaman would have received while aboard vessels on which he or she would have served in the future had the injury not occurred. The entitlement to found begins when the entitlement to maintenance ends. After a seaman reaches maximum cure and his or her right to maintenance terminates, the seaman may recover found on proper showing of liability on the part of the employer. This element is generally included in a claim for loss of "fringe benefits" in a Jones Act suit.

Compensatory and Punitive Damages and Attorneys' Fees

Upon receiving a claim for maintenance and cure, the shipowner need not immediately commence payments but may, instead, investigate and require corroboration of the claim. However, there is an escalating scale of liability for a shipowner who fails to pay maintenance and cure benefits that are later determined to have been owed.

Where the shipowner is liable for maintenance and cure but has been reasonable in denying liability, the shipowner would be liable only for the amount of maintenance and cure owed. However, where the shipowner has refused to pay without a reasonable defense, the shipowner is liable not only for maintenance and cure but also for any compensatory damages caused by the failure to pay.

Where the shipowner not only lacks a reasonable defense but also has exhibited callousness and indifference to the seaman's plight or acted arbitrarily, willfully, and capriciously in handling the claim, a shipowner becomes liable not only for maintenance and cure benefits and compensatory damages but also punitive damages and attorneys' fees as well. However, the continued availability of punitive damages and attorneys' fees has been a topic for debate.

How To Insure Wages, Maintenance, and Cure Exposures

Employers can obtain coverage by purchasing a maritime coverage endorsement (WC 00 02 01 B) to a standard workers compensation policy, discussed next.

Maritime Coverage Endorsement (WC 00 02 01 B)

The employers liability coverage part of the 2015 National Council on Compensation Insurance workers compensation policy excludes from coverage liability for bodily injury to a master or member of the crew of any vessel. The maritime coverage endorsement adds coverage for this exposure.

The endorsement replaces the five provisions under “How This Insurance Applies” in the employers liability coverage part section with six provisions that are spelled out in the endorsement. Items A.1., 4., 5., and 6. in the endorsement are identical to items A.1., 3., 4., and 5. in the policy. Item A.2. in the endorsement is very similar to its counterpart in the basic policy language: it specifies that the employment must be necessary or incidental to work described in the schedule that is part of the maritime coverage endorsement, instead of to the insured’s work in a state or territory listed under item 3.A. of the information page.

However, item A.3. of the endorsement is unique to the maritime coverage endorsement. It stipulates that coverage applies only to bodily injury occurring in the territorial limits of, or in the operation of a vessel sailing directly between the ports of, the continental United States of America, Alaska, Hawaii, or Canada. For any insured whose employees might be injured outside of these areas—en route to or from another country, for example—this coverage restriction should either be deleted from the policy or amended to cover all of the territory in which the insureds would ever conduct operations.

The endorsement deletes the exclusion in the employers liability coverage section of the policy that eliminates coverage for bodily injury to a master or member of the crew of any vessel. It also adds two new exclusions: an exclusion of bodily injury covered by a protection and indemnity policy and an exclusion of transportation, wages, maintenance, and cure that applies only if no premium charge for this coverage is shown in item 2. of the endorsement schedule.

Protection and indemnity (P&I) policies are specialty liability coverage policies purchased mainly by vessel owners but also by “bareboat” charterers of vessels (*bareboat* charters are those chartering only a vessel, without the crew). P&I policies provide coverage for a number of different types of liability faced by vessel owners, including liability for injuries suffered by seamen. However, purchase of maritime liability coverage under the workers compensation policy is often recommended to vessel owners also purchasing a P&I policy, as a safeguard, because there are situations where an employers liability claim would not be covered by the P&I policy. For example, P&I policies apply only to injuries suffered in connection with vessels listed on the P&I policy schedule. A claim by a worker injured in connection with work on a ship not scheduled on the P&I policy, perhaps simply because of an oversight, would not be covered under the P&I policy. Assuming that the two policies are properly arranged, the P&I policy would cover the vast majority of any maritime employers liability claims against the vessel owner, and the maritime coverage endorsement to the workers compensation policy would respond in the event of a claim that is not covered under the P&I policy. In such a case, the workers compensation underwriter *should,* at least in theory, be willing to provide the coverage on an “if any” basis for little or no premium.

P&I policies can be written with an exclusion of liability for bodily injury to crew members. In fact, it is increasingly common for P&I policy underwriters to quote the coverage including and excluding liability for injury to crew members, with the pricing structured so as to encourage vessel owners to select the excluding crew quote. In such a case, the vessel owner would be relying totally on the maritime liability endorsement to the workers compensation policy to respond to all maritime employers liability claims, and the pricing of the workers compensation endorsement would reflect that fact.

Notice that the maritime coverage endorsement excludes from coverage any bodily injury covered by a P&I policy issued to the insured, “even if the other policy does not apply because of an ‘other insurance,’ deductible, or limitation of liability clause, or any similar clause.” P&I policies often have other insurance clauses that stipulate that there is no coverage for any claim covered by another policy. Insureds purchasing both a maritime coverage endorsement to the workers compensation policy and a P&I policy need to make sure that the other insurance clauses of these two policies are amended as needed to clearly indicate which policy is intended to be primary with respect to employers liability claims.

P&I policy deductibles typically range from $5,000 to $25,000 per occurrence, whereas workers compensation policies usually do not contain a deductible clause. The provision in this endorsement excludes bodily injury covered by a P&I policy even if the other policy does not apply because a deductible clause prevents the insured from being able to collect the amount of the P&I policy deductible under this endorsement to the workers compensation policy.

P&I policies commonly contain an exclusion for liability imposed by workers compensation law. However, this exclusion does not affect coverage under the P&I policy for maritime employers liability claims, because the laws that establish the rights of seamen in the event of on-the-job injury are employers liability laws, not workers compensation laws.

Keep in mind that not all employers whose employees might be eligible for recovery under maritime law are vessel owners. Employees of barber shops or other service businesses on board a vessel might well have valid claims for on-the-job injury under maritime law. For these businesses, the maritime coverage endorsement to the workers compensation policy is the only coverage available to respond to maritime employers liability claims.

An action *in rem* is a legal proceeding against the vessel (as opposed to an action *in personam*, which is a legal proceeding against the employer). It is essentially a maritime lien that is satisfied by proceeds from the sale of the vessel if the action is successful. This provision amends the policy to apply to an action *in rem* against a vessel owned or chartered by the insured as a suit against the insured.

The endorsement alters the policy's employers liability limits with respect to liability for bodily injury to a master or crew member of a vessel. Instead of three liability limits, there are two: a per accident limit for liability arising out of bodily injury by accident and a policy aggregate limit for liability arising out of bodily injury by disease. There is no per employee disease limit.

As discussed previously, the endorsement excludes coverage for transportation, wages, maintenance, and cure *unless* a premium for that coverage is shown in the endorsement schedule. Since the premium notation in the schedule triggers coverage, it is crucial that a premium (or other notation, such as "included") be inserted in the schedule if this coverage is needed. Vessel owners who also have a P&I policy would not normally need coverage for transportation, wages, maintenance, and cure under this endorsement.

Item 3. of the endorsement schedule is to be filled in with the per accident and disease aggregate limits that apply to maritime employers liability coverage. According to the National Council on Compensation Insurance (NCCI) *Basic Manual,* the standard maritime coverage limits are $100,000 per accident and $100,000 disease aggregate. Currently, the standard employers liability limits cited in the *Basic Manual* are $100,000 per accident, $100,000 per employee-disease, and $500,000 disease—policy limit. However, many umbrella insurers currently require employers liability limits of at least $500,000/$500,000/$500,000. As a practical matter, it is unlikely that these umbrella insurers would be willing to provide excess coverage over maritime limits of any less than $500,000/$500,000.

In addition to the maritime coverage endorsement, there are two other NCCI endorsements that can be used in certain circumstances.

Voluntary Compensation Maritime Coverage Endorsement (WC 00 02 03)

None of the laws that give rise to an employer's liability for on-the-job injuries suffered by seamen are workers compensation laws with scheduled benefits. There is the potential for injured seamen who can prove some negligence on the part of the employer to recover amounts that are much greater than state workers compensation benefits. For this reason, many employers who are subject to maritime employers liability elect to purchase voluntary workers compensation coverage, using this endorsement, *in addition to* maritime liability coverage (using the maritime liability coverage endorsement, WC 00 02 01 B). This approach allows the employer to offer the injured employee the workers compensation benefits of the state designated in the endorsement, in hopes of avoiding a negligence action. If the offer is rejected and the employee files suit, the maritime coverage endorsement applies.

Limited Maritime Coverage Endorsement (WC 00 02 04)

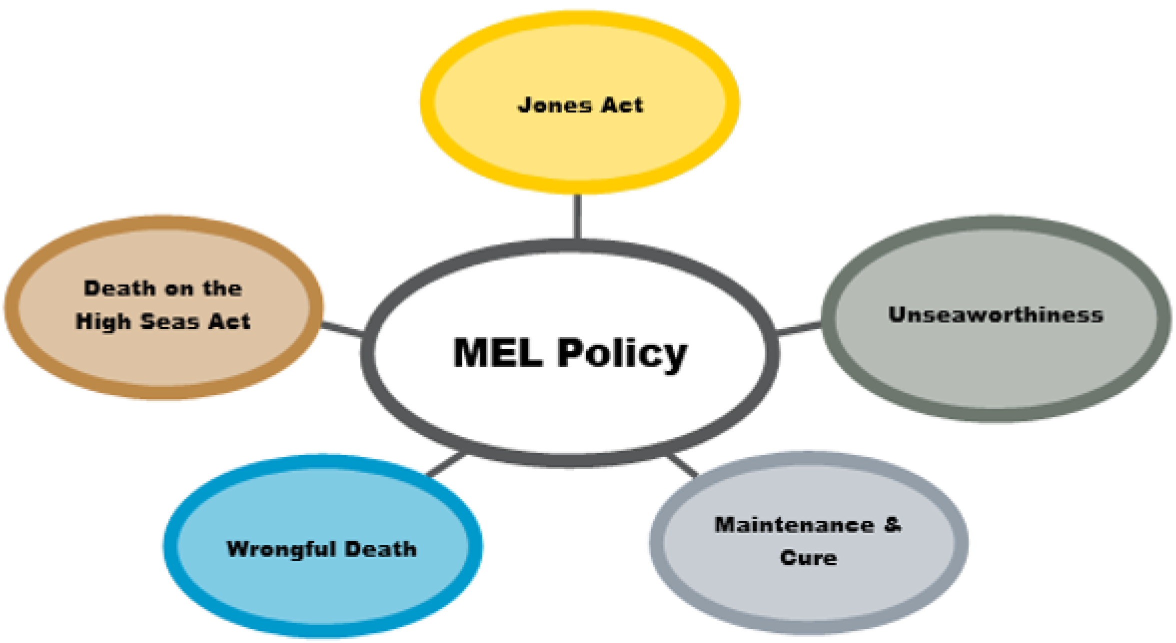
This endorsement eliminates the employers liability exclusion for bodily injury to masters and crew members of a vessel with respect only to work encompassed by the classifications listed in the endorsement schedule. It is most often used on policies covering service businesses for which operations would not normally bring the employees under maritime employers liability, when there is a remote or incidental connection with a vessel by virtue of occasional service provided to a vessel. The endorsement schedule is to be filled out with the classification code numbers and associated work descriptions of the workers providing the incidental service to a vessel.

Maritime Employers Liability (MEL) Policy

Vessel owners who do not cover crew under their P&I policy with a Jones Act endorsement may purchase a Maritime Employers Liability (MEL) policy. The typical MEL policy covers an employer's potential liability under the Jones Act for loss of life, illness, and injury to those employees classified as *seamen* in the service of a *vessel.*

Some P&I insurers limit Jones Act coverage to specified crew. This intent is to limit coverage to employees performing traditional crew functions furthering the mission of the vessel and to exclude coverage for contracting personnel working from vessels. If this is the case, owners should consider MEL coverage.

MEL insurance coverage responds through a puzzle of general maritime laws and acts.



MEL coverage is very broad in that unlike workers compensation and LHWCA coverage, MEL insurance is not regulated on either the state or federal level. There is no standard MEL policy form, and coverage can vary greatly among MEL products. There are also no standard rates. So coverage can be tailored to meet the needs of the company. Coverage usually is provided in excess of a deduction or retention.

Glossary

Allocated Loss Adjustment Expenses (ALAE)—Loss adjustment expenses that are assignable or allocable to specific claims. Fees paid to outside attorneys, experts, and investigators used to defend claims are examples of ALAE. If loss adjustment expenses are not assigned to a specific claim they are unallocated loss adjustment expenses.

Average Weekly Wage (AWW)—An employee's pre-injury earning capacity, based on earnings in the period directly preceding a work-related injury or illness. The formula for calculating average weekly wage varies by state.

basic premium—In a retrospective rating plan, the policy standard (or subject) premium multiplied by the basic premium factor or basic premium ratio. It provides for insurer expenses, profit, and contingencies.

borrowed servant rule—A common law legal doctrine stipulating that if an employer (usually referred to in this rule as the special employer) borrows a worker from another employer (usually referred to in this rule as the general employer), the special employer can be held liable for the borrowed employee's actions, despite the fact that a permanent employee-employer relationship does not exist.

comparative negligence—The rule used in negligence cases in some states that provides for computing both the plaintiff's and the defendant's negligence, with the plaintiff's damages being reduced by a percentage representing the degree of his or her contributing fault. If the plaintiff's negligence is found to be greater than the defendant's, the plaintiff will receive nothing.

competitive state funds—State-owned-and-operated facilities that compete with commercial insurers in writing workers compensation insurance specific solely to that state. The states with these funds are Arizona, California, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, and Utah.

consequential bodily injury suits—A type of lawsuit insured by the employers liability coverage of a workers compensation policy. In this type of legal action, a member of the injured worker's family purports to have an injury that directly results from the injury to the employee. Often, mental injuries are alleged. Legislative action in many states has narrowed the applicability of this type of lawsuit.

contributory negligence—Negligence of a plaintiff constituting a partial cause or aggravation of his or her injury. This doctrine bars relief to the plaintiff in a lawsuit if the plaintiff's own negligence contributed to the damage. Contributory negligence has been superseded in many states by other methods of apportioning liability.

cumulative injury—A type of worker's injury that arises from the repetition of mentally or physically traumatic job tasks over an extended length of time. Examples are carpal tunnel syndrome and hearing loss.

Death on the High Seas Act (DOHSA)—A federal remedy for the death of seamen or other individuals arising from negligence, strict liability, or the unseaworthiness of a vessel and occurring on the high seas that is beyond 3 nautical miles from shore on a worldwide basis.

deductible plan—A workers compensation insurance rating plan under which an insured retains each loss up to the deductible amount, and for which the insurer remains responsible for claim payment if the insured defaults. The insurer is also responsible for claims handling services.

Defense Base Act—Legislation that extends the Longshore and Harbor Workers' Compensation Act (LHWCA) to apply to employees working overseas (a) on military bases acquired from a foreign government after 1940, (b) for contractors and subcontractors engaged in public work projects for the U.S. government outside the continental United States, or (c) employed outside the continental United States by a U.S. employer whose purpose it is to provide welfare or other such services to the Armed Forces as approved by the Secretary of Defense.

designated workplaces exclusion endorsement—A standard workers compensation endorsement (WC 00 03 02) that removes coverage for injuries sustained at workplaces listed in the endorsement. Commonly used on contractors' policies to exclude coverage with respect to projects on which the contractor is covered under a wrap-up insurance program.

divided risk endorsement—Can be attached to any type of insurance policy for the purpose of delineating exposures covered by particular insurance policies (e.g., project or site-specific policies) in order to remove any possibility of double coverage.

employee leasing—A permanent staffing method under which an employee leasing company (sometimes called a professional employer organization (PEO) or a labor contractor) provides all or most of its client's employees.

endemic disease coverage—Specifies that workers compensation and employers liability coverage will apply to injury or death of an employee arising out of a disease that is peculiar to a foreign country, even though the disease is not covered under the workers compensation or occupational disease laws of the designated state.

excess workers compensation insurance—A type of coverage available for risks that choose to self-insure the majority of workers compensation loss exposures. Coverage can be specific, which controls loss severity by placing a cap on losses arising out of a single occurrence, and aggregate, which addresses loss frequency by providing coverage once a cumulative per occurrence loss limit is breached.

exclusive remedy—A component of workers compensation statutes that bars employees injured on the job from making a tort liability claim against their employers. The benefits provided under workers compensation are the sole remedy available to injured employees.

expatriate—A person living and working in a country other than his or her own homeland.

experience modifier—A factor developed by measuring the difference between the insured's actual past experience and the expected or actual experience of the class. This factor may be either a debit or credit and, therefore, will increase or decrease the standard premium in response to past loss experience and produce a premium that is more representative of the actual loss experience of an insured.

extraterritorial coverage—The extension of state workers compensation law to provide benefits for workers hired in the state but injured while working in another state. This term is also used in international insurance to denote coverage for work-related injuries occurring outside the boundaries of the country of hire.

Federal Coal Mine Health and Safety Act (FCMHSA)—Legislation passed in 1969 that provides no-fault coverage for employees injured while working the coal mines located in the United States. A key component of the law is Title IV, which deals with black lung disease.

Federal Employers Liability Act (FELA)—A federal statute that provides for a liberalization of the rules for determining tort liability applicable to the liability of railroads to their employees for personal injury. Unlike under normal tort rules where the injured party must prove negligence on the part of the defendant, under FELA, the employee need only show that any negligence on the part of the employer contributed to the injury.

found—The value of food and lodging that a seaman would have received while aboard vessels that he or she would have served on in the future had the injury not occurred. The entitlement to found begins when the entitlement to maintenance ends. After a seaman reaches maximum cure and his or her right to maintenance terminates, the seaman may recover found on proper showing of liability on the part of the employer. This element is generally included in a claim for loss of "fringe benefits" in a Jones Act suit.

general maritime law—A common law concept of which origin is rooted in historic sea codes and requires the owner of the vessel to provide the entire crew with transportation, wages, room and board (maintenance), and medical services (cure) for the duration of the voyage.

guaranteed cost—Premiums charged on a prospective basis without adjustment for loss experience during the policy period. A rate is multiplied by the appropriate exposure base (e.g., sales, payroll, number of vehicles, or square footage) to yield the premium. Only a change in the exposure base during the policy period will cause the premium to vary.

high seas—Those seas beyond 3 nautical miles from the shore of any state, territory, or dependency of the United States, and the territorial waters of a foreign nation.

Incurred But Not Reported (IBNR) losses—An estimate of the amount of an insurer's (or self-insurer's) liability for claim-generating events that have taken place but have not yet been reported to the insurer or self-insurer.

incurred losses—The total amount of paid claims and loss reserves associated with a particular period of time, usually a policy year. Incurred losses are customarily computed in accordance with the following formula: losses incurred during the period, plus outstanding losses at the end of the period, less outstanding losses at the beginning of the period.

incurred loss retro—An insurance risk financing plan under which the insured pays a premium based on actual loss experience incurred during the policy period. Incurred losses include the outstanding reserves and expenses of the claims in addition to the actual paid indemnity and medical costs.

***in rem* endorsement—**A workers compensation coverage endorsement extending coverage for suits filed against the value of the ship by an injured crew member seeking for the recovery of damages. The suit must cite the unseaworthy condition of the vessel as proximate cause of the damages.

interstate experience rating—An experience rating plan for risks operating on a multistate (interstate) basis that utilizes the experience developed within more than one state.

intrastate experience rating—An experience rating plan that utilizes the experience developed within one state only.

Jones Act (Merchant Marine Act of 1920)—Provides seamen with a negligence remedy for on-the-job injury without having to overcome employer defenses of assumption of the risk or fellow servant liability.

large deductible plan—A cash flow workers compensation insurance program that allows the insured to retain a portion of each loss through a substantial deductible and to transfer onto an insurer losses in excess of that deductible.

Longshore and Harbor Workers' Compensation Act (LHWCA)—A federal law that provides no-fault workers compensation benefits to employees other than masters or crew members of a vessel injured in maritime employment—generally, in loading, unloading, repairing, or building a vessel.

Loss Conversion Factor (LCF)—A factor used in the retrospective rating formula that provides a charge to cover unallocated claims and the cost of the insurer's claim services. Since the charge is developed as part of the formula, the amount the insured will pay for unallocated loss expenses is a function of losses.

loss development—The difference between the original loss as initially reserved by an insurer and its subsequent evaluation at a later date or at the time of its final disposal because of (a) inflation during the time period in which losses are reported and ultimately settled and (b) time lags between the occurrence of claims and the time they are actually reported to an insurer. To account for these increases, a "loss development factor" (LDF) is usually applied to more accurately project the ultimate claim amount.

loss limitation—An optional feature of a retrospective rating plan that limits or "caps" the amount of loss (usually at the $100,000 level, or more) that would otherwise be applied to the calculation of premium. An additional premium is charged for this feature by means of an "excess loss premium factor" (ELPF).

loss of consortium suit—A legal action often brought by the spouse of the injured worker that alleges the loss of spousal services including but not limited to companionship, help with household duties, and sexual relations. Suits of this type can also be brought by parents or children of the injured worker.

loss reserve—An estimate of the value of a claim or group of claims not yet paid. A case reserve is an estimate of the amount for which a particular claim will ultimately be settled or adjudicated. Insurers will also set reserves for their entire books of business to estimate their future liabilities.

loss sensitive plan—An insurance rating plan for which the final premium is dependent on the actual losses during the period the plan is in effect. Deductible plans, retrospective rating plans, dividend plans, and retention plans are all examples of loss sensitive plans.

maintenance, cure, and wages—A concept within general maritime law that spells out the duties owed by the owner of a vessel to the crew. The terms are defined as follows.

> ***maintenance—*** The proper rehabilitation and working environment that should be available to the seaman including but not limited to the provision of lodging and food over the course of recovery.
>
> ***cure—*** Medical treatment toward recovery, at least as far as medical science is able to provide. Also termed "maximum medical cure," this obligation is owed a seaman for accidents as well as sicknesses that generally do not fall within the provisions of state compensation acts.
>
> ***wages—*** A sailor's usual wages during illness, but not extending beyond the end of the voyage. On ships operating year-round, on inland waterways, wages may not extend beyond a period of a year, the end of the contract, or the period of illness, whichever is shortest.

Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA)—Federal Act that establishes a private right of action for actual or statutory damages (as well as criminal and administrative sanctions) against employers and contractors of migrant or seasonal agricultural workers who violate the Act's housing and motor vehicle safety requirements, motor vehicle liability insurance requirements, and job information disclosure requirements.

monopolistic state funds—Jurisdictions where an employer must obtain workers compensation insurance from a compulsory state fund or qualify as a self-insurer (as is allowed in four of the states). The following states/jurisdictions are monopolistic fund states: North Dakota, Ohio, Washington, Wyoming, Puerto Rico, and the U.S. Virgin Islands.

multiple coordinated policies—An arrangement of workers compensation insurance coverage typically used in the residual market to assure that workers leased through an employee leasing company/professional employer organization (PEO) are afforded coverage without gaps or overlaps. The leasing company/PEO and each of its clients purchase separate policies with a common expiration date, written by a single insurer, then the multiple coordinated policy endorsement that specifies which leased employees are covered.

occupational disease—Any abnormal condition or disorder, other than one resulting from an occupational injury, that is caused by, or alleged to be caused by, exposure to environmental factors associated with employment, including acute and chronic illnesses or diseases that may be caused by inhalation, absorption, ingestion, or direct contact. State workers compensation laws vary as to whether coverage is afforded for occupational disease.

occupational injury—An injury arising in the course and scope of employment that is caused by factors associated with the work undertaken.

other states coverage—Workers compensation and employers liability insurance coverage for an insured's employees traveling through or temporarily working in states other than the insured's home state. The endorsement expands the policy so that an injured employee can receive compensation benefits as prescribed by the other states listed on the endorsement.

Outer Continental Shelf Lands Act (OCSLA)—Extends the benefits of the Longshore and Harbor Workers' Compensation Act (LHWCA) to workers injured or killed upon fixed structures, for example, oil well platforms, that are permanently attached to the Outer Continental Shelf (i.e., all submerged lands that lie beyond the coastal states' territorial boundaries, to a water depth of 200 meters or where exploration is feasible) for the purpose of natural resource exploration or development.

paid loss retrospective rating plan—An insurance cash flow plan that allows the insured to hold loss reserves until they are paid out in claims. Used most frequently with workers compensation and general liability lines.

payroll limitation—A limitation on the amount of payroll for certain classifications used for the development of premium. In workers compensation insurance, it typically applies only to sole proprietors, executive officers, partners, and certain noted classifications. The limitation varies by state.

permanent partial disability—A workers compensation disability level in which the injured employee is still able to work but not with the skill and efficiency demonstrated prior to the injury. As a result, the earning capability of the worker is affected. Most workers compensation statutes provide for scheduled benefits based on the percentage of disability.

permanent total disability—A class of workers compensation disability in which the injured employee is incapable of ever working again at any employment. Under most statutes, the employee will receive weekly wages for life.

premium discount—A volume discount applied to premiums that acknowledges the administrative cost savings associated with larger premiums. Mostly used in workers compensation insurance, it is available in states where rates are approved and published.

primary duty rule—A seldom-applied rule that provides that a seaman may not recover from his or her employer for injuries caused by his or her own failure to perform a duty imposed on him or her by his or her employment. This defense is commonly referred to as the Walker-Reinhart doctrine.

Protection and Indemnity (P&I) insurance—Liability insurance for practically all maritime liability risks associated with the operation of a vessel, other than that covered under a workers compensation policy and under the collision clause in a hull policy. There is no standard P&I form with the specific terms and conditions for each insured tailored by underwriters based on the nature of the risk and the character and amount of insurance desired by the insured. Additionally note that since the P&I policy is essentially a contract of indemnity, the insurer is not obligated to pay unless the insured must actually pay the claim.

repatriation—Bringing back to one's homeland, generally referring to transportation of an injured or ill employee back to his or her home country. This coverage is sometimes added to the workers compensation policy by a manuscript foreign voluntary compensation endorsement.

residual market—Insurance market systems for various lines of coverage (most often workers compensation, personal automobile liability, and property insurance) that are a coverage source of last resort for firms/individuals rejected by voluntary market insurers. Insurers writing specific coverage lines in a given state are required to assume the profits or losses accruing from insuring that state's residual risks in proportion to their share of the total voluntary market premiums written in that state.

Residual Market Load (RML)—A factor applied to workers compensation policies by insurers to recover costs assessed them by states for deficits in the residual markets.

retrospective rating—A rating plan that adjusts the premium, subject to a certain minimum and maximum, to reflect the current loss experience of the insured. Retrospective rating combines actual losses with graded expenses to produce a premium that more accurately reflects the current experience of the insured. Adjustments are performed periodically, after the policy has expired.

schedule rating—Modification of manual rates either upward (debits) or downward (credits) to reflect the individual risk characteristics of the subject of insurance.

self-insurance—A system whereby a firm sets aside an amount of its monies to provide for any losses that occur—losses that could ordinarily be covered under an insurance program. Self-insurance is a means of capturing the cash flow benefits of unpaid loss reserves and also offers the possibility of reducing expenses typically incorporated within a traditional insurance program.

standard premium—The premium developed by multiplying the appropriate rate by the proper exposure unit. This figure is then modified by experience rating, if applicable.

state funds—State-owned-and-operated organizations that write workers compensation insurance. Some states have monopolistic funds, which are the only market for workers compensation insurance in those states. Other states have competitive funds that compete with insurers in that state only.

stop gap endorsement—An endorsement that provides employers liability coverage for work-related injuries arising out of incidental operations or exposures in monopolistic fund states. The endorsement is attached to the workers compensation policy when the employer has operations in nonmonopolistic states or the general liability policy when the employer operates exclusively in a monopolistic fund state.

tax multiplier—A component of a retrospective rating plan that represents the costs associated with taxes, assessments, and other fees that the insurer must pay to the states on premiums written and collected.

temporary partial disability—A workers compensation disability level in which the injured worker is temporarily precluded from performing a certain set of job skills but who can still work at a reduced level. Since the condition is temporary, compensation is based on the difference between the two earning levels.

temporary total disability—A workers compensation disability level in which the injured worker is rendered completely unable to perform any job functions on a temporary basis. The employee is expected to make a full recovery and return to work. In the interim, compensation paid is usually a percentage of weekly wages until the worker returns to the job.

third-party-over action—A type of action in which an injured employee, after collecting workers compensation benefits from the employer, sues a third party for contributing to the employee's injury. Then, because of some type of contractual relationship between the third party and the employer, the liability is passed back to the employer.

voluntary compensation endorsement—Enables an employer to extend the benefits provided by the workers compensation act to employees who may not be entitled to benefits under the terms of the act, such as executive officers, partners, sole proprietors, farm workers, domestic employees, or employees traveling overseas.

voluntary compensation maritime coverage endorsement—Allows an employer with maritime workers compensation exposure to offer benefits of the state designated in the endorsement to an injured employee or survivors of a deceased employee.

Walker-Reinhart doctrine—See **primary duty rule**.

End Notes

[1] It is contained in Title 33 of the United States Code 901.

[2] OCSLA is contained in Title 43 of the United States Code 1331.

[3] The Act is found in Title 46 of the United States Code § 688, et seq., which adopts by reference the substantive provisions of the Federal Employers Liability Act (FELA), Title 45 of the United States Code § 51, et seq.

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[5] Located in Title 46 of the United States Code § 761, et seq.