



Think SeaBright for Your Small Maritime Clients!

Our small maritime program is ideal for accounts with manual premiums from \$10,000 to \$125,000. We provide USL&H, MEL and State Act coverage for a wide variety of marine-related risks. Contact one of our selected wholesalers today!

All Risks, LTD
rlang@allrisks.com

Alliant Insurance Services, Inc.
dfrainer@alliantinsurance.com

Appalachian Underwriters, Inc
warren.palmer@appund.com

International Special Risks
dlemay@isr-insurance.com

LIG Program Managers
TBridges@ligpm.com

MarketScout
dkerr@marketscout.com

Peachtree Special Risk Brokers
jlasseigne@psrllc.com

PointSure Insurance Services
julia.fincher@pointsure.com

Sloan Mason Insurance Services
paul@sloanmason.com

Swett & Crawford
ron_boudreaux@swett.com

Federal and Admiralty Laws Booklet Available from SeaBright

This booklet is a great primer on who is covered under the Jones, USL&H and other federal acts, and when and where coverage applies. To request your complimentary copy, please visit the "Request a Brochure" page on our website at www.sbic.com.

JANUARY 30, 2012

Longshore Exclusion for Recreational Vessel Repair Redefined

The 1972 and 1984 Amendments to the Longshore Act were the result of extensive hearings, committee work, and had extensive published legislative histories. However, during the chaos leading up to the passage of the "Stimulus Bill" or American Recovery and Reinvestment Act of 2009, Sec. 803, Pub. L. 111-5, 123 Stat 115 (2009), hundreds of non-germane amendments, or "earmarks", were attached to the legislation in order to secure the votes of wavering Congress members. Debbie Wasserman Schultz (D-Florida) had long sought to exclude from Longshore coverage small Florida ship building and repair yards that serviced private recreational vessels, and she finally succeeded via an earmark to this bill. Her amendment expanded the existing group of Longshore-excluded recreational vessel repairers, and employees who dismantle those vessels for repair, by removing the prior 65-foot vessel length restriction. The regulations implement the amendment by clarifying the definition of "recreational vessel", and specifying when the amendment applies. Industry Notice 137, issue December 30, 2011, promulgates the final rule interpreting the statutory amendment, and the effective date of the regulation is January 30, 2012. The new regulation applies to all injuries occurring on or after February 17, 2009, the effective date of the enabling legislation.

Between 1984 and 2009, the LHWCA excluded "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length," provided that the individuals were "subject to coverage under a State workers' compensation law." 33 U.S.C. 902(3)(F) (2000). With the passage of the Stimulus Bill in 2009, Congress amended the LHWCA exclusion to remove the 65 foot limitation for repair work. The amended provision now excludes "individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel" without regard to vessel size. Note that builders of recreational vessels over 65 feet in length remain covered under the act as amended. However, "recreational vessel" was never

defined in the LHWCA and no definition was included in this latest amendment. To address this void, the Department of Labor proposed a rule to clarify the amendment.

The rule as originally proposed would have adopted the Coast Guard's definition of "recreational vessel" in its entirety: "(a) Recreational vessel means a vessel—(1) Being manufactured or operated primarily for pleasure; or (2) Leased, rented, or chartered to another for the latter's pleasure. (b) Recreational vessel does not include a—(1) 'Passenger vessel' as defined by 46 U.S.C. 2101(22); (2) 'Small passenger vessel' as defined by 46 U.S.C. 2101(35);(3) 'Uninspected passenger vessel' as defined by 46 U.S.C. 2101(42); (4) Vessel routinely engaged in 'commercial service' as defined by 46 U.S.C. 2101(5); (5) Vessel that routinely carries 'passengers for hire' as defined by 46 U.S.C. 2101(21a). (c) An individual who performs recreational vessel work not excluded under paragraph (a) of this section or who engages in other qualifying maritime employment in addition to recreational-vessel work excluded under paragraph (a) of this section will not be excluded from the definition of 'employee.'" 75 FR 62435.

In response to objections from the small boat industry, the final rule adds two more considerations:

- A vessel manufacturer or builder may determine whether a vessel is "recreational" under the regulation based on the vessel's design rather than on its end use.
- A vessel that is recreational in design and construction and that is used as a "public vessel"—one owned, operated, or bare-boat chartered by the Federal or a State government, including subdivisions—will be deemed recreational under the regulation if it is not normally engaged in military or commercial activity.

The original proposal also clearly stated how it would apply to workers in small shipyards, and it contained these definitions:

- (1) "Length" means a straight line measurement of the overall length from the foremost part of the vessel to the aft most part of the vessel, measured parallel to the center line. The measurement must be from end to end over the deck, excluding sheer. Bow sprits, bumpkins, rudders, outboard motor brackets, handles, and other similar fittings, attachments, and extensions are not included in the measurement.
- (2) "Repair" means any repair of a vessel including installations, painting and maintenance work. Repair does not include alterations or conversions that render the vessel a non-recreational vessel under § 701.501. For example, a worker who installs equipment on a private yacht to convert it to a passenger-carrying whale-watching vessel is not employed to "repair" a recreational vessel. Repair also does not include alterations or conversions that render a non-recreational vessel recreational under § 701.501.
- (3) "Dismantle" means dismantling any part of a vessel to complete a repair but does not include dismantling any part of a vessel to complete alterations or conversions that render the vessel a non-recreational vessel under § 701.501, or render the vessel recreational under § 701.501, or to scrap or dispose of the vessel at the end of the vessel's life.

The Department of Labor clearly wants to limit the kinds of vessels that meet the definition, and its original proposal and explanation highlighted that any commercial use of a pleasure craft, presumably including hosting a business-related function on a privately-owned vessel, would take it out of the "recreational vessel" category. The addition of a subject element to the rule as requested by the small boat industry, i.e., looking at the design of the vessel and letting the ship yard determine whether it is "recreational," suggests that the definition may continue to be malleable in the courts.

However the term is ultimately applied, it is still clear that shipyard workers who work on commercial vessels of any size acquire status as maritime employees. If they are later injured building a "recreational vessel" in a covered situs, they may still be entitled to Longshore benefits. SeaBright's expert maritime underwriters can help our brokers and policyholders understand how this recently-amended exclusion may apply to their operations.



Contact Information:

Mary Ann Calkins, Senior Vice President - Maritime
maryann.calkins@sbic.com | 206.269.8583

Tracey Hughes, Underwriting Officer - Maritime
tracey.hughes@sbic.com | 206.269.8556