



**SeaBRIGHT**<sup>®</sup>  
INSURANCE COMPANY

# USL&H COVERAGES FEDERAL AND ADMIRALTY LAWS:

WHO IS COVERED? WHEN AND WHERE DO THEY APPLY?







## Longshore and Harbor Workers' Compensation Act

Workers' compensation laws covering maritime employment, and how they are applied to various situations, can be complex and confusing. Although attempts have been made by Congress to clarify these laws, there continues to be questions of interpretation which must be resolved by either administrative or judicial decisions.

Employers with a maritime exposure need to understand how federal and admiralty laws may affect their employees. This brochure discusses these laws to help you understand them so you can discuss them with your clients.

In analyzing the insurance needs of an employer, one of the first considerations is to make sure recommended coverages meet the requirements of the workers' compensation laws of states where the employer has operations. But attention to state law alone may not be enough. Federal laws apply broadly both at the waterfront and to employees working aboard vessels.

Although most states had adopted workers' compensation laws by 1920 to cover injuries to workers, efforts to apply these laws to maritime employment were held unconstitutional – an improper invasion by state governments into the federal government's interest in maritime matters. The Jones Act of 1920 extended the provisions of the Federal Employer's Liability Act of 1908 to seamen of U.S. flag vessels.

To provide a workers' compensation system for maritime employees (other than seamen) who work on the navigable waters of the United States, Congress enacted the Longshore and Harbor Workers' Compensation Act in 1927.

Under the original USL&H Act, ambiguities were created when courts attempted to determine whether state or federal laws applied in certain cases. In trying to resolve these jurisdictional questions, a so-called "twilight zone" doctrine evolved. The USL&H Act was amended extensively in 1972 to establish a jurisdictional base or scope for the law by redefining those employers and employments subject to the Act. The 1972 legislation eliminated many of the questions that had existed, but it didn't answer all of them.

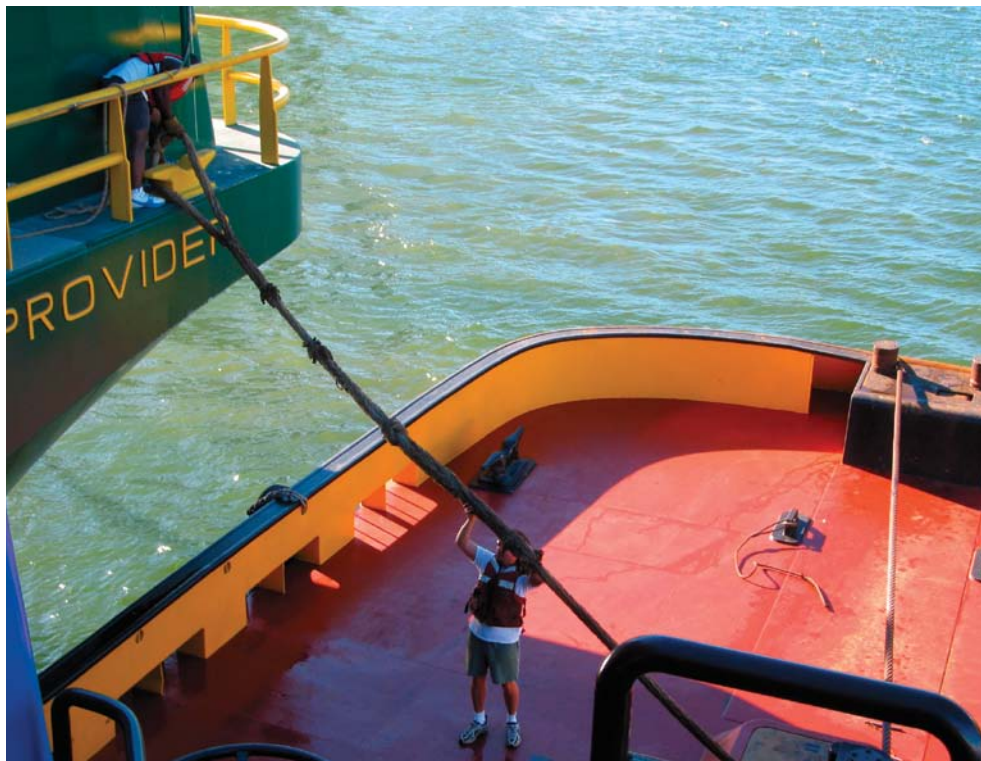
The USL&H Act was amended again in 1984 to clarify Congress' intent to exclude individuals working on or near the waterfront whose job duties have no relationship to maritime commerce. However, questions will continue to be raised, to be resolved administratively or judicially and, perhaps, legislatively.

## Where Does The Act Apply?

For a claim to be within the jurisdiction of the USL&H Act, the accident must have occurred on or adjacent to navigable waters of the United States.

1. “Navigable waters” are those which, by their depth, width and location, are used, or can be used, for navigation, trade and travel by water and for commerce (inter-state or foreign). Generally, these are oceans and bays, plus certain lakes and rivers. For example, Lake Tahoe, which borders both Nevada and California, is considered “navigable waters of the United States” but Clear Lake, wholly in California, is not.
2. “Adjacent to the water” means on any pier, wharf, dry-dock, terminal, building way, marine railway or any other area customarily used in the loading, unloading, building, repairing or dismantling of a vessel.

Note that there is no distinct boundary determining where state act coverage ends and longshore coverage begins. Rather, the job duties of the employee determines the appropriate jurisdiction.



## Who is Subject To The Act?

The employer must have some employees engaged in full or part-time maritime employment. The term “employee” means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. This term does not include:

- a. Individuals employed **exclusively** to perform office clerical, secretarial, security, or data processing work;
- b. Individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
- c. Individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
- d. Individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of a maritime employer and (iii) are not engaged in work normally performed by employees of that employer under the Act;
- e. Aquaculture workers;
- f. Individuals employed to build any recreational vessel under sixty-five feet in length or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel;
- g. A master or member of a crew of any vessel; or
- h. Any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

These exemptions are conditional on an individual's coverage, for jurisdictional purposes, under state workers' compensation laws.

In early 2012 the U.S. Department of Labor issued a rule clarifying the meaning of "recreational vessel." In essence, such a vessel must be manufactured or operated primarily for pleasure use, or leased, rented or chartered to others for pleasure use. Under this definition:

- A vessel manufactured, built, or being repaired under warranty by its manufacturer is a recreational vessel if the vessel is designed for recreational use.
- A vessel being repaired, dismantled for repair, or dismantled at the end of its life is not a recreational vessel if it is routinely used as a passenger vessel.
- If not used routinely as a passenger vessel, a public vessel owned/chartered and operated by a governmental entity is a recreational vessel if at the time of repair or dismantling is designed for recreational use and is not normally used commercially or by the military.

More information is available at the Department of Labor website at [www.dol.gov](http://www.dol.gov).

## Possible Maritime Employments

The USL&H Act provides workers' compensation to land-based maritime employees, while the Jones Act provides tort remedies to sea-based maritime workers. There are many additional situations involving possible coverage under the USL&H Act. Some of the more frequent are:

**Casual visitors on vessels.** Casual business visitors are generally subject to state workers' compensation laws. Other visitors, employed by a maritime employer, who make frequent trips to vessels or maritime sites to transact business may be covered by the USL&H Act.



Examples of such visitors are:

- Representatives of longshoremen's union;
- Employees of customhouse brokers;
- Insurance Adjusters;
- Cargo handlers; and
- Steamship company employees.

**Dredging operations.** Historically, injuries to persons employed in dredging operations have been within USL&H jurisdiction where such operations are carried on in navigable waters. However, recent case law provides an avenue for certain injured workers to pursue Jones Act remedies when dredging is conducted from a vessel in navigation.

**Maritime construction.** Injuries to persons in marine construction are within USL&H jurisdiction where such construction is conducted upon, or adjacent to, navigable waters and includes the construction of piers, bulkheads, breakwaters and other structures over water. However, Jones Act remedies may be available for injuries sustained while working from a vessel, work platform, barge or dredge.

## Coverage and Rates

In 1992, the National Council on Compensation Insurance revised the standard workers' compensation policy to specifically exclude all federal coverages. Special endorsements must be attached to the policy to provide coverage under

the USL&H Act and other federal workers' compensation acts. Most states establish separate premium rates for insurance under the USL&H Act. In Washington and California, rates are not established and carriers set their rates independently, subject to regulatory approval.

## Benefits

Benefits under the USL&H Act are generally more liberal than those of many states. Here are some examples:

- Pension benefits, with automatic cost of living adjustments, are paid to those who are totally and permanently disabled, to a surviving spouse until death or remarriage and to any other eligible survivors who can prove dependency.
- Maximum weekly disability and death benefits equal to two-thirds of the worker's average weekly wage, subject to a maximum of 200 percent of the national average weekly wage.
- Loss of wage-earning capacity of the injured worker with certain non-scheduled permanent partial disabilities.
- Three-day waiting period is eliminated if disability exceeds 14 days.
- A weekly maintenance payment of \$25 is provided by the Special Fund of the U.S. Department of Labor to those undergoing approved rehabilitation programs, which is in addition to other benefits while disabled.
- If the carrier or employer refuses to pay compensation and is subsequently found liable for payment of benefits, the claimant may be awarded attorney fees

commensurate with the legal services performed.

## Notice of Compliance

The employer must post a notice at the place of business showing that he or she has complied with the provisions of the Act by purchasing insurance or by qualifying as a self-insurer. As a part of the service when insurance is purchased, the insurance company will provide the necessary notices.

## Exclusive Remedy

The USL&H Act provides the "exclusive remedy" for an injured employee against the employer. The 1972 amendments to the act abolished any action by a longshoreman or harbor worker against the owner of a vessel based upon the warranty of seaworthiness or breach of that warranty. Prior to this amendment, longshoremen could bring an action against the owner of a vessel for injuries caused by the unseaworthiness of the vessel if they performed duties traditionally done by seamen. However, under 33 USC 905 (b) of the USL&H Act, an injured worker can seek to recover damages due to negligence where the employer is also the vessel owner. This is commonly referred to as "dual capacity", where the employer is sued for negligence stemming from ownership of the vessel and not arising from its role as employer. Dual capacity does not apply in the case of shipyard workers, who are barred from seeking such recovery from their employer in its role as vessel owner.



## Claims Reporting

When an employee reports an accident or injury or the maritime employer becomes aware of such, the employer has 10 days to file two copies of the *Employer's First Report of Injury or Occupational Illness (Form LS 202)* with the U.S. Department of Labor, Office of Workers' Compensation Programs (OWCP). Failure to file a timely report can result in extending the statute of limitation and the assessment of a fine not to exceed \$10,000.

At the same time, the employer should furnish the employee three copies of *Request for Examination and/or Treatment (Form LS 1)* authorizing him or her to consult his or her free-choice physician. An *Employer's Supplementary Report of Accident or Occupational Illness (Form LS 210)* may be filed when an employee is disabled in excess of three days or when he or she returns to work and is subsequently disabled again for the same injury.

Once the carrier assumes the responsibility for the USL&H coverage of the employer, all subsequent actions are to be taken by the carrier. The first temporary disability payment is due on the 14<sup>th</sup> day after the employer has knowledge of the injury.

## Rehabilitation

Major rehabilitation provisions of the USL&H Act include:

- Requiring insurers to report to the OWCP all cases where rehabilitation is recommended, has commenced or where the employee will be or has been disabled more than two months
- Suggesting that cases be referred to the OWCP rehabilitation specialist when rehabilitation is recommended by the treating physician, the employee requests it, or the employer/insurer believes it will assist in restoring the employee to meaningful employment

- Providing payment from the Special Fund of the U.S. Department of Labor for the cost of rehabilitation services under a recommended rehabilitation program when handled by the OWCP rehabilitation specialist
- Recommending that the employer/insurer continue to pay disability benefits during the duration of rehabilitation services

## Other Federal Compensation Acts

In addition, the USL&H Act applies to several areas having nothing to do with the waterfront.

### Defense Base Act

This act extends the USL&H Act to employees of U.S. contractors that have contracts with the United States government to perform services outside the continental United States. All workers enjoy coverage from the moment they sign an employment contract with the employer in the United States until their return and termination of their contract. Coverage is virtually 24 hours a day while they are stationed overseas; however, those injured in the United States may be covered as well. The Defense Base Act endorsement attached to the policy provides proper coverage.

### Outer Continental Shelf Lands Act

This act applies to injuries "...arising out of or in connection with any operations conducted on the outer continental shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources or involving rights to the natural resources of the subsoil and seabed of the outer continental shelf..."

The act extends the provisions of the USL&H Act to those employees who are

injured on fixed oil platforms on the outer continental shelf. Oil workers on floating oil rigs are covered under the Jones Act. For the purposes of the act, “outer continental shelf” means that area of the continental shelf that lies beyond historic state boundaries and usually extends beyond three miles from the shore. Included are artificial lands and fixed structures on such lands. For example, workers on fixed oil platforms at an oil industry project near Long Beach, California and within the three-mile limit come under the California state act, while those beyond three miles on the outer continental shelf are covered under the USL&H Act as extended by the Outer Continental Shelf Lands Act.

The Outer Continental Shelf Lands Act endorsement attached to the policy provides the appropriate coverage.

## Non-Appropriated Fund Instrumentalities Act

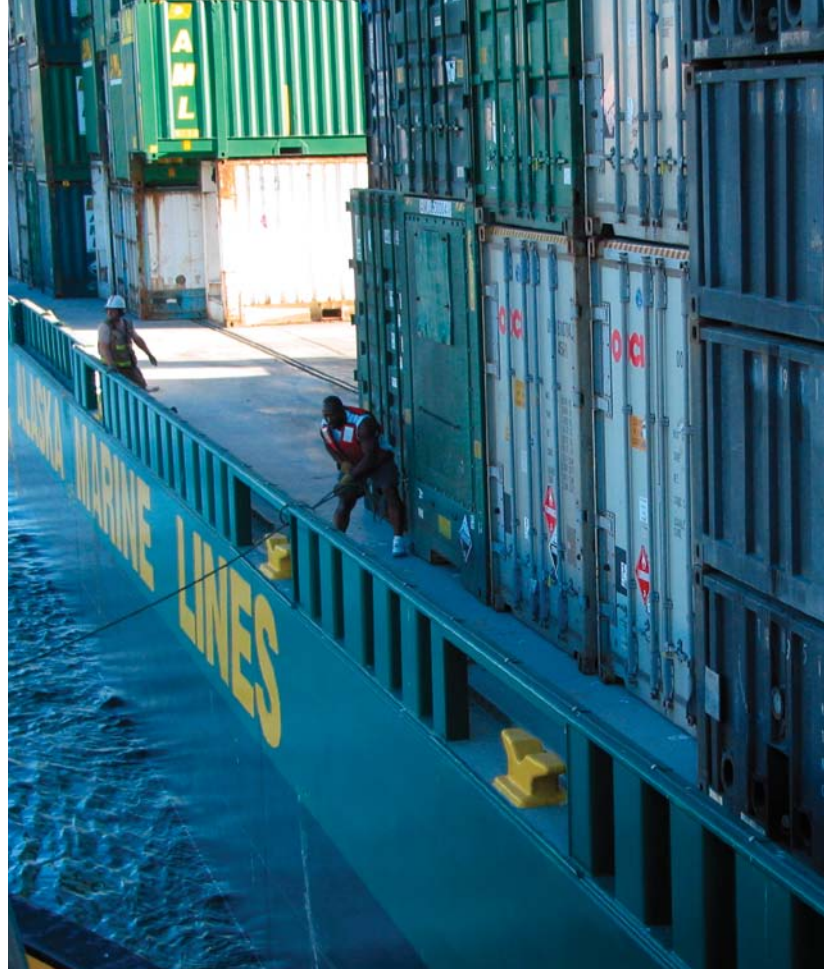
This act extends the provisions of the USL&H Act to employees of “non-appropriated fund” instrumentalities of the armed forces – that is, civilian employees of the Army and Air Force post exchanges, motion picture services, Navy ship stores ashore, and Navy or Coast Guard exchanges.

The Non-Appropriated Fund Instrumentalities Act endorsement should be attached to the policy when appropriate.

## Crews of Ships

Seamen, as opposed to harbor workers and longshoremen, are protected in the event of injury or death by general maritime law and federal legislation. While these laws are complex, a basic understanding of them and their relationship with each other can be helpful. The first question is: What is a seaman?

Originally, a seaman was anyone engaged in duties connected with navigation of



sailing vessels. Today, generally speaking, a seaman is anyone who is employed by or engaged in any capacity on a vessel and who contributes to the mission/operations and welfare of the vessel. For example, the following have been considered seamen: engineers, fishermen, ferryboat hands, pilots, pursers, bartenders (on cruise ships), bakers, cooks, painters and firemen.

## Seamen’s Rights

Under general maritime law a seaman receives “transportation, wages, maintenance, and cure” – that is, continuation of wages, room and board and medical care for the duration of the voyage or as long as is reasonable, until maximum cure has been achieved. These rights are a basic part of the contract of hire and *are not dependent upon a finding of negligence*. In addition, a seaman has a right to sue for damages from the owner of a vessel for injuries resulting from the vessel’s unseaworthiness.

“Seaworthiness” is normally understood to mean that the ship’s hull, appliances, appurtenances and manning will be reasonably fit for its intended purpose. The standard is not perfection, but reasonable fitness. Unseaworthiness is not limited by the concept of negligence.

All that needs to be shown is that the defendant was the owner or the person in control of the vessel, the claimant was a seaman or had come aboard to perform those services normally rendered by the crew, the vessel was unseaworthy in whole or part, and the proximate cause of the injury was the unseaworthiness of the vessel. Recovery under the concept of unseaworthiness extends not only to injuries but to death.

### **Jones Act (also known as the Merchant Marine Act)**

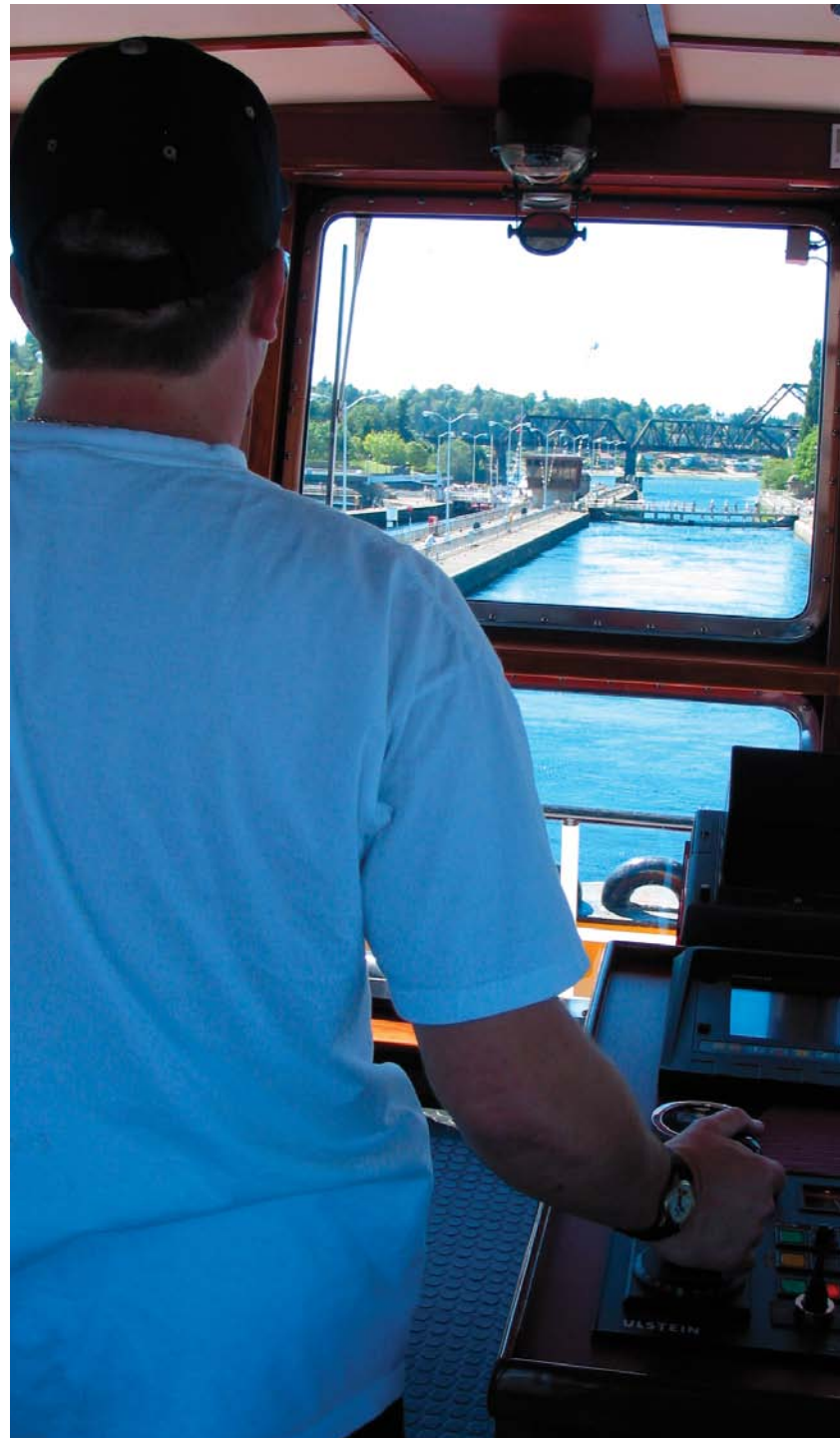
In addition to general maritime law, the most important legislation relating to injuries to seamen is the Jones Act.

The Jones Act is based on negligence and eliminates many defenses, including assumption of the risk and contributory negligence. However, it includes comparative negligence. For the purposes of coverage under the Jones Act the term “seaman” can differ from the definition that generally would apply under general maritime law. It is always a question of fact and is normally determined by application of the following test:

- A seaman must have a connection to a vessel (or an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. That does not necessarily mean “permanently assigned.”
- The vessel must be in navigation and engaged as an instrument of commerce or capable of transportation on navigable waters. The courts have

interpreted this broadly. For instance, the vessel may be considered “in navigation” if moored to a pier, in a repair yard, temporarily attached to some object, or on its anchorage.

- A worker’s duties must contribute to the function of the vessel and assist in the furtherance of the vessel’s mission. However, the worker does not necessarily have to be aboard the vessel when the injury occurs.





The Jones Act gives seamen a right to trial by jury and incorporates the provisions of the Federal Employer's Liability Act into maritime law.

To be considered in the employ of the vessel one need not have signed "ship's articles" (an agreement between the captain and the seaman), so long as one is working aboard the vessel. The general maritime law, however, will not protect a mere volunteer assisting the crew in its activities. While in the general sense the term "vessel" includes all navigable structures intended for or capable of transportation, there is no set legal definition. The meaning of the term is continually being expanded and extended by the courts – and even covers mobile off-shore drilling platforms.

A worker's status regarding whether he or she is a seaman or longshoreman/harbor worker is often the subject of litigation and may present an exposure to the employer

that he did not anticipate. For example there have been cases where a worker painting from a paint raft or skiff was deemed to be a Jones Act Seaman because the raft or skiff was a "vessel".

A seaman's rights under the Jones Act, as well as under maritime law, are conditioned by the contractual agreement of employment for serving aboard a vessel. This means the seaman's rights continue while on shore – so long as the employee is acting within the course of this employment.

## Death On The High Seas Act

Prior to passing the Jones Act, Congress enacted the "Death on the High Seas Act." This act allows the personal representative of any deceased person to recover damages from the vessel when the death is caused by a wrongful act (there must be proof of negligence or unseaworthiness) on the high seas – that is, beyond three miles

from the shore of any state or territory.

As can be seen, a seaman is entitled to many remedies – both under general maritime law and federal statutes. The seaman is always entitled to transportation, wages, maintenance and cure, independent of any other remedies.

## Obtaining Coverage

It is customary to provide liability coverage to operators, owners and charterers of vessels by means of a Marine Protection and Indemnity Policy (P&I), which might be better described as a ship operator's liability policy. This specialty coverage is available through marine liability underwriters. In addition to non-employee coverages, the P&I policy protects the insured for his or her liability under the general maritime law, the Jones Act and the Death on the High Seas Act.

If the employer does not buy a P&I policy to cover employer's liability, or if the employer wishes to cover all employment-related coverages on a single policy, coverage for employee injuries may be provided under a workers' compensation policy endorsed to provide USL&H and Maritime Employers Liability coverages.

It's important to remember that because coverage for vessel operations is essentially liability coverage, the limit of liability must be in line with the employer's overall insurance program.

## Producer's Role

There are many laws that protect the longshoreman and the seaman. To determine what laws may apply in order to obtain proper coverage for your maritime employer/client, you will want to determine:

- The nature, type and full description of the vessel and its personnel
- The place, time and all circumstances of hiring
- Where the employee eats and sleeps and what the terms of hiring were – that is, how long and on what basis of pay (hourly, daily, monthly or other)
- Whether the employee is contractually bound to the vessel or group of vessels or has a lien on the vessel for wages
- What the employee's job duties encompass, **in detail**

As a professional agent or broker, you can't afford to overlook exposures your client may have. While this publication briefly summarizes the laws covering injuries to maritime employees, for specific information on an exposure one of your maritime employer/policyholders may have, contact your SeaBright underwriter.

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