



NUTS AND BOLTS OF LONGSHORE AND HARBOR WORKERS' COMP (LHWCA)



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NUTS AND BOLTS OF LONGSHORE AND HARBOR WORKERS' COMP (LHWCA)

- 33 U.S.C. §§ 901, *et seq.*
- Provides employee benefits similar to state workers' comp to employees.
- Employee defined as "Any person engaged (in whole or in part) in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, ship builder, and shipbreaker."
 - Does not include master or member of crew of any vessel, or any person engaged by master to load/unload/repair vessel under 18 tons.
- Compensates for lost wages, medical bills, and rehabilitation to:
 - Longshore Workers
 - Harbor Workers
 - Maritime Employees Other Than "Seamen"



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NUTS AND BOLTS OF LONGSHORE AND HARBOR WORKERS' COMP (LHWCA)

- **Enacted in 1927**
 - Failure of state compensation to address longshore exposure.
 - Court rulings denying state benefits to employees injured on navigable waters.
 - Passage followed by courts having difficulty determining LHWCA or state comp.
- **1972 LHWCA Amendments**
 - Before amendment employee could file claim and sue shipowner.
 - Before amendment employee entitled to state comp any time on land.
 - Situs test fixed this.
 - Injury must occur on navigable waters (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).
 - Coverage requires two things:
 - 1) Situs (on, near navigable water), and
 - 2) Status (employee does traditional longshore work or is on navigable waters).

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NUTS AND BOLTS OF LONGSHORE AND HARBOR WORKERS' COMP (LHWCA)

- 1984 LHWCA Amendments
 - Attempt to limit shoreside coverage by excluding:
 - Clerical, Secretarial, Security, Data Processing Employees
 - Club, Camp, Recreational Operation, Restaurant, Museum, Retail Employees
 - Employees of marina not engaged in construction, expansion of marine (routine maintenance included).
- Lifetime Medical
- Wage Compensation (AWW) calculated on 52 weeks of earnings.
 - Compensation for injured body part, or
 - 2/3 of AWW.
- Death Benefits





NUTS AND BOLTS OF LONGSHORE AND HARBOR WORKERS' COMP (LHWCA)

- Dual Jurisdiction: Some Actions Covered By LHWCA and State Comp
 - Many states eliminated this overlap.
 - Alaska: Overlap when injury on land adjoining navigable water.
 - When Overlap, Most Choose LHWCA
 - Subrogation Law May Change That Choice
 - Washington: Exempts state comp if there is claim under maritime law.
- Extension of Benefits
 - Outer Continental Shelf Lands Act (OCSLA)
 - Defense Base Act (DBA)
- "Twilight Zone" Jurisdiction





LONGSHORE AND HARBOR WORKERS' COMPENSATION SUBROGATION RIGHTS

- 33 U.S.C. § 933 (Subrogation vs. Reimbursement Rights)
 - a) Employee can receive benefits and sue a third party.
 - b) "Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment" (formal award) to employer of third-party rights.
 - Employee has right to file for first six (6) months.
 - Employer then has ninety (90) days to file (exclusive right to sue).
 - After ninety (90) days, the right reverts back to employee.
 - If formal comp award not entered, assignment doesn't apply, even if voluntarily comp payments made, and right to file remains with employee.
 - Mere acceptance of benefits does not comply.
 - The requirement of formal award was designed to protect the employee from unexpected loss of third-party rights.



LONGSHORE AND HARBOR WORKERS' COMPENSATION SUBROGATION RIGHTS

- c) The employer may either file suit or settle the third-party case, with or without filing suit.
- d) Carrier steps into shoes of employer:

(h) Subrogation. Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.





LONGSHORE AND HARBOR WORKERS' COMPENSATION REIMBURSEMENT RIGHTS

- Where employee files suit and makes recovery, employer has right of reimbursement.
- 33 U.S.C. § 933(f)(g) addresses how third-party recovery is apportioned when employee files suit.
 - LHWCA does not expressly provide for reimbursement.
 - Courts have said the carrier is entitled to reimbursement
 - *Chenevert v. Travelers Indem. Co.*, 746 F.3d 581 (5th Cir. 2014).
 - *North River Ins. Co.*, 764 F.2d 306 (5th Cir. 1985).
 - Employer's/carrier's lien attaches to any third-party recovery.
- Plaintiff cannot settle around lien.





LONGSHORE AND HARBOR WORKERS' COMPENSATION REIMBURSEMENT RIGHTS

- 33 U.S.C. § 933(g) gives employer and carrier right to approve or reject a settlement in writing.
 - Only if recovery is less than total comp obligation (past and future).
 - If recovery more than total comp obligation, future longshore benefits cease.
 - Doesn't apply if there is a judgment.
- Even if subrogation is WAIVED, employee must get consent of employer/carrier to settle.



U.S. Department of Labor
Office of Workers' Compensation Programs

Approval of Compromise of Third-Party Cause of Action
(Print 3 copies)

Last Name: _____ First Name: _____ MI: _____
 Address: _____
 Anniversary: _____

DWCP Case No.

The above named employer and its insurance carrier, having liability for disability/death benefits under the Act in the above captioned case, and being advised that the claimant or representative above named has compromised the cause of action against _____ third persons, which arose out of the injury/death on _____ in the case, in the gross amount of \$ _____ and the net amount of \$ _____ dated _____ herewith approves said compromise on the date shown herein, pursuant to the provisions of Sec. 551j of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 951j(g).

Employer _____
 By _____ Title _____ Date _____

Insurance Carrier _____
 By _____ Title _____ Date _____

Claimant _____
 By _____ Title _____ Date _____

Filed on _____ in the Office of the District Director for the _____ Compensation District
 Date _____ District Director _____

This form, or a signed statement in lieu thereof containing language of the same intent, must be filed in the office of the District Director having jurisdiction of the subject injury or death within 30 days after compromise is made in order to insure that the employer shall be liable for compensation as provided in section 551j.

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Form LW-33
Rev. 06-2000

LW-33 FORM

APPORTIONMENT OF RECOVERY WHEN EMPLOYEE FILES SUIT

- 33 U.S.C. § 933(g) addresses how third-party recovery is apportioned when employee files suit.
- Any recovery (settlement or judgment) is distributed as follows:
 - Employee gets attorneys' fees and litigation expenses.
 - Employer recovers past compensation and medical paid.
 - Any remaining balance paid to employee.
 - Employer receives a future credit in the amount of the employee's net recovery.
 - Any remaining balance paid to employee.
- Employee cannot settle around LHWCA carrier – statutory lien.
- Consent:** Employer/carrier has right to approve or reject settlement if less than benefits paid/owed.

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APPORTIONMENT OF RECOVERY WHEN EMPLOYER FILES SUIT

- 33 U.S.C. § 933(f) addresses how third-party recovery is apportioned when employer files suit.
- Employer has exclusive control of suit — employee doesn't enjoy same rights when he files.
- Any recovery (settlement or judgment) is distributed as follows:
 - Employer gets attorneys' fees and costs as determined by the Deputy Commissioner or Board.
 - Employer recovers past lien.
 - "Cost" of all benefits furnished to employee under Section 7 (medical expenses).
 - Section 7(b) of the Act, 33 U.S.C. § 907(b)
 - All amounts paid as "compensation".



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APPORTIONMENT OF RECOVERY WHEN EMPLOYER FILES SUIT

- Employer recovers present value of future comp benefits owed.
 - Computed in accordance with schedule prepared by Secretary.
- Employer also recovers present value of all benefits under Section 7 (medical expenses).
 - Estimated by the deputy commissioner.
- Future benefits held "as trust fund to pay such compensation and the cost of such benefits as they become due."
- Any remaining balance (excess) paid to employee.
- Employer has exclusive control of suit — employee doesn't enjoy same rights when he files.





GERRYMANDERING OF SETTLEMENTS


- Elements of Damage
 - Subrogation applies to all damages, including pain and suffering.
 - *Force v. Director*, OWCP, 938 F.2d. 981 (9th Cir. 1991).
- Beneficiaries and Non-Beneficiaries
 - Subrogated only to third-party proceeds recovered by LHWCA beneficiaries.
 - Make sure apportionment specified in settlement agreement.
 - Burden on employer to prove amount subject to subrogation.
 - ALJ or Board may set aside settlement if unfair.
 - Some courts state if settlement agreement doesn't specify, lien/credit goes against entire amount.
 - *Cretan v. Bethlehem Steel Corp.*, 24 Ben. Rev. Bd. Serv. (MB) 35 (1990).
 - Other courts say ALJ must conduct hearing.
 - *Force v. Director*, OWCP, 938 F.2d. 981 (9th Cir. 1991).



FUTURE CREDIT


- Section 933(f) (employee files) provides the carrier must pay "a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such person."
- Employer is entitled to a credit or "offset" for the net amount of the injured employee's recovery.
- First, determine "net amount" recovered by employee.
- Then compare "net amount" to amount due as compensation.
 - If more, no further payments necessary.
 - If less, carrier only owes difference between recovery and compensation due.






SPECIAL FUND (SECOND INJURY FUND)

- Established when LHWCA was enacted in 1927.
- Pays certain types of claims and expenses.
 - Cases where carrier can't pay.
 - Section 8(f) of LHWCA.
- Claims are paid by the Special Fund only upon application by carrier, self-insured employer, or District Director or ALJ.
- Special Fund has statutory lien on proceeds of any third-party recovery. 33 U.S.C. § 933(g)(3).
- Settlement: Must file LS-33 and statement outlining settlement distribution.
- Special Fund payments are lien on proceeds of settlement.




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DEFENSE BASE ACT (DBA)


- "Compensation for Disability or Death to Persons Employed at Military, Air, and Naval Bases outside United States."
- LHWCA benefits and coverage for U.S. civilian contractors abroad.
- Must be working under contract with federal government.
 - Employer must obtain DBA coverage or risk penalties.
 - Administered by the Division of Longshore and Harbor Workers' Compensation.
- Coverage provided if "obligation or condition" of employment created a "zone of special danger" from which injury arose.
- Subrogation Difficult
 - Hostile Foreign Land
 - Armed Conflict



Defense Base Act


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WAR HAZARD ACT REIMBURSEMENT

- Extension of LHWCA benefits through Defense Base Act (DBA).
- Pays benefits to government contractors as a result of:
 - Detention by "hostile force or person" or
 - Injury or death due to "war-risk hazard".
 - Any hazard arising during a war;
 - Discharge of missile, weapon, explosive in attack, real or imagined;
 - Action of hostile force or person;
 - Discharge of munitions intended for war; and
 - Collision of vessels without running lights or in zone of hostilities.
 - Cannot be active duty military personnel.
- Purpose: Shift financial burden of war-risk injuries to government.
- No reimbursement allowed if war hazard premium charged.
- File Form CA 278, statements, medical reports, ins. policy, statement as to why it's war hazard, and itemization and proof of payments.



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THIRD PARTIES

- Employee (First Party); Carrier (Second Party).
- LHWCA is exclusive remedy against employer (§ 905).
- 905(b) Claim — Negligence of Vessel (Adjudicated Under Federal Law).
 - Some vessel owners provide their own stevedoring services.
 - Two hats (dual capacity): can be liable as vessel owner.
 - *Burnside Action*
- Employee must prove vessel-based negligence distinct and separate from employer-based negligence.





THIRD PARTIES

- Jones Act (46 U.S.C.A. § 688)
 - Seamen (crew members) can sue their *employer* if fellow workers or shipmasters are negligent (unreasonably careless).
 - Sea-Based Maritime Employees
 - Mutually-Exclusive With LHWCA
- Outer Continental Shelf Act
 - Applies to oil rig workers, maintenance staff, and roustabouts who work on offshore facilities.
 - Employees qualify for LHWCA benefits if injured while on outer continental shelf.
 - Three Miles Off Any State's Coast





ATTORNEYS' FEES AND COSTS

- For many years, carrier subrogated without owing fees/costs.
- 1984 Amendment: Employee entitled to fees/costs off top.
 - Carrier entitled to 100% reimbursement thereafter.
 - No fees/costs owed by carrier.



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**DETERMINING THE SCOPE OF
A WAIVER OF SUBROGATION**



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**PERFORMED UNDER
THE CONTRACT**



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**PERSONAL INJURIES TO
AN EMPLOYEE**



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To The Extent of Indemnity Obligations Assumed Under The Contract





All of the insurance policies of [contractor] shall be endorsed to waive subrogation against [client] with respect to all liabilities and indemnity obligations assumed by [contractor] under this agreement.





The indemnifications set forth above shall not extend to injury and/or death of the indemnitor's personnel caused by the indemnitee's negligence.





COMPANIES BENEFITTING FROM THE WAIVER OF SUBROGATION








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“Client, its parent, subsidiaries, affiliated companies, joint ventures, partners, co-owners, and their respective officers, employees, agents, and invitees.”

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COMPANY GROUP



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CHECK THE POLICY LANGUAGE

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WAIVER OF SUBROGATION ENDORSEMENT


POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY
CG 24 04 05 09**

WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US


This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
SCHEDULE**

Name Of Person Or Organization:



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BLANKET WAIVER OF SUBROGATION ENDORSEMENT


POLICY NUMBER: **COMMERCIAL GENERAL LIABILITY
CG 24 04 05 09**

BLANKET WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

This endorsement modifies insurance provided in the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART
SCHEDULE**

Name of Person or Organization: _____




IF ANY OTHER ENDORSEMENT, RENEWAL OR SUPPLEMENTARY ENDORSEMENT MODIFYING THIS ENDORSEMENT WILL BE APPLIED TO THIS POLICY, THIS ENDORSEMENT WILL NOT APPLY TO THIS POLICY.

THE WAIVER OF RIGHTS OF RECOVERY AGAINST OTHERS UNDER THIS COVERAGE PART IS LIMITED TO THE WAIVER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US.

THIS IS A FULL AND COMPLETE WAIVER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US. THIS WAIVER DOES NOT WAIVE THE RIGHTS OF RECOVERY AGAINST OTHERS TO US UNDER ANY OTHER COVERAGE PART OF THIS POLICY.

THIS WAIVER DOES NOT WAIVE THE RIGHTS OF RECOVERY AGAINST OTHERS TO US UNDER ANY OTHER COVERAGE PART OF THIS POLICY.



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WAIVER OF SUBROGATION BY WRITTEN CONTRACT



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WAIVER OF SUBROGATION FOR INJURIES ARISING FROM WORK PERFORMED



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STATUTES BARRING WAIVERS OF SUBROGATION

A photograph of a large blue ship docked at a port, illuminated by warm lights.

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OUTER CONTINENTAL SHELF LANDS ACT (OCSLA)

Pursuant to the Outer Continental Shelf Lands Act (OCSLA), federal law generally applies to such disputes and state law is applied "only as federal law and then only when not inconsistent with applicable federal law." When there are "gaps in the federal law," OCSLA adopts the law of the adjacent state, such as Louisiana, as surrogate federal law "[t]o the extent that [the adjacent state's law is] applicable and not inconsistent with [OCSLA] or with other Federal laws and regulations."

See *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355-57 (1969); 43 U.S.C. §1333(a)(1), (a)(2)(A); *Frugé ex rel. Frugé v. Parker Drilling Co.*, 337 F.3d 558, 560 (5th Cir. 2003) ("[T]he law applicable is federal law, supplemented by state law of the adjacent state." (internal quotation marks omitted)).



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OILFIELD ANTI-INDEMNITY ACTS



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Louisiana's Oilfield Anti-Indemnity Statutes Louisiana Revised Statute § 9:2780



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Any provision in any agreement ... which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this section, shall be null and void and of no force and effect.



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Texas Oilfield Anti-Indemnity Act (TOAIA)
 Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001, *et seq.*



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**TEXAS OILFIELD ANTI-
 INDEMNITY ACT (TOAIA)**

The TOAIA provides that an indemnification provision in a contract pertaining to an oil or gas well that purports to indemnify a person against loss or liability for damages that result from the negligence of the indemnitee and arise from personal injury, death, or property injury is against public policy and void unless the conditions of § 127.005 of the Act are met. See Tex. Civ. Prac. & Rem. Code § 127.003.



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In *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118 (Court of Appeals of Texas, Houston [1st Dist.] 2002), the insurer argued the TOAIA invalidated the waiver of subrogation. The Court concluded it did not, but only because the waiver of subrogation in the contract was mutual, and mutual indemnity obligations were allowed under the TOAIA.



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CONSTRUCTION STATUTES



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TRANSPORTATION AGREEMENTS



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**LONGSHORE & HARBOR WORKERS'
COMPENSATION SUBROGATION**



Gary L. Wickert
gwickert@mw-law.com
Hartford, WI Office

MWL
MATHISEN, WICKERT & LEHRER, S.C.
ATTORNEYS AT LAW
800-637-9176
www.mw-law.com



James T. Busenlener
jbusenlener@mw-law.com
New Orleans, LA Office

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