

## **WORKERS' COMPENSATION INSURANCE for DEPLOYED DEFENSE CONTRACTORS**

As the amount of contractor support to U.S. military operations increases, both contractors and contracting officers are faced with more questions about contractor employees deployed outside the continental United States performing “public work.”

- What are the requirements for contractors to provide workers' compensation for their deployed employees?
- How can contractors obtain workers' compensation insurance?
- Where can someone learn about the requirements for reporting and processing claims through the Department of Labor?
- What is the organization within the Department of Labor that handles compensation for death or injury to contractor employees who are performing covered work?
- What are the statutes and regulations that address compensation for deployed employees?
- What are the penalties for failing to secure the necessary insurance?
- Can a company self-insure?

This article attempts to answer these and other questions, and to provide leads to sources of information for those questions that are not addressed. Previous articles have covered the basics of the federal workers' compensation regulations, and provided a review of the contract clauses that are required by the Federal Acquisition Regulation. This article will focus on how to achieve compliance with those regulations.

### **The Basics**

For contracts with the U.S. Army Materiel Command (AMC), Army Pamphlet 715-18, “AMC Contracts and Contractors Supporting Military Operations,” published in June 2000 provides guidance on Workers' Compensation in Chapter 33. Although the pamphlet is published by AMC, the information regarding the laws is applicable to contracts with all military departments.

The pamphlet describes the three laws that impact compensation for contractor employees deployed outside the continental United States (OCONUS): the Defense Base Act (DBA), the Longshore and Harbor Workers' Compensation Act (LHWCA), and the War Hazards Compensation Act (WHCA). Each of these laws individually is complex, and to complicate matters, for purposes of defense contractor employee workers' compensation, they are woven together. A brief review of each follows.

The **Defense Base Act (DBA)**, Title 42, U.S. Code, Chapter 11 (42 U.S.C. 1651-1654) affords compensation benefits for the injury or death of any employee engaged in any

DBA-covered employment under certain contracts. There are several instances of covered employment set forth in the DBA, and the pamphlet states those situations, as described in 42 U.S.C. 1651(a)(1) through (6).

The **Longshore and Harbor Workers' Compensation Act (LHWCA)** is incorporated by reference into the DBA. Rather than creating a new compensation scheme to achieve the objectives of the DBA, Congress extended “ ‘the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act to private employment at all bases acquired after January 1, 1940 . . .’ The Defense Base Act has been amended to expand the area of coverage outside the continental United States but the basic compensation act remains the [LHWCA].” 51 Comp. Gen. 125, B-162408, August 26, 1971. Thus, entitlement to benefits is first established according to the DBA; once entitlement is established, look to the LHWCA to determine the benefit.

Lastly, another statute that provides benefits for contractor civilian employees deployed abroad is the **War Hazards Compensation Act (WHCA)**. The WHCA, 42 U.S.C. 1701 et seq., enacted in 1942, provides compensation for employees in the event of war hazards. When the DBA applies . . . the benefits of the [LHWCA] are extended through the operation of the [WHCA] . . . to protect the employees against the risk of war hazards (injury, death, detention). FAR 28.305(c)

### **The Department of Labor’s Role**

The U.S. Department of Labor (DOL) includes, among its many organizations, the Employment Standards Administration (ESA). The ESA includes the Office of Workers’ Compensation Programs (OWCP). The OWCP includes the Division of Longshore and Harbor Workers’ Compensation (DLHWC). The DLHWC published in September 2000 the Longshore and Harbor Workers’ Compensation Act (LHWCA) Procedure Manual. This manual can be found on-line at [www.dol.gov/esa/regs/compliance/owcp/lspm01.pdf](http://www.dol.gov/esa/regs/compliance/owcp/lspm01.pdf).

One of the key roles of the Director of DLHWC is that of administering the provisions of the Acts pertaining to the authorization of insurance carriers desiring to write LHWCA compensation insurance policies and to the authorization of self-insured employers issuing certificates. There will be more about the authorization of insurance carriers below. In addition, the Division processes and adjudicates claims filed under the WHCA.

### **Authority and Background of the LHWCA**

The LHWCA (33 U.S.C. 901-950), passed in 1927, provides compensation payable by an employer to an employee (or employee’s dependents) for disability or death due to an injury occurring upon the navigable waters of the U.S. Since 1927, provisions of the Act have been extended to include additional groups of employees. Pertinent to this discussion is the extension of the Act under the DBA.

The DBA was enacted in 1941. Through its several amendments, the DBA provides workers' compensation coverage for workers engaged in employment on overseas defense bases, or under contracts with the United States (or an agency thereof) for public work to be performed OCONUS. To be compensable under the Act, a claim must stem from employment either on a U.S. base overseas or under a "contract" for "public work" overseas, public work constituting Government-related construction projects, work connected with national defense, or employment under a service contract supporting either activity.

The DBA was enacted "to provide substantially the same relief for injuries or death of employees at bases leased by the United States . . . as existing law affords similar employees in the United States, and to assist contractors employing labor at such bases in obtaining compensation insurance at reasonable rates." 51 Comp. Gen. 125, *To the Secretary of the Army*, B-162408, August 26, 1971 *citing* S. Rept. No. 540, 77<sup>th</sup> Cong. 1<sup>st</sup> sess. As stated above, Congress chose not to create a new workers' benefit/compensation scheme, but to use the one already in place under the LHWCA.

The LHWCA provides a comprehensive program to compensate for partial or total disability, personal injuries, necessary medical services and supplies, death benefits, loss of pay, and burial expenses for persons covered by it. Generally, compensation is payable irrespective of fault as to the cause of the injury.

### **The War Hazards Compensation Act**

The WHCA applies the benefit structure of the LHWCA to certain employees of contractors engaged in work OCONUS who are exposed to war risks. These cases are normally adjudicated under the DBA until a compensation order is issued and there is a determination that the death/injury was the result of a war-risk hazard, at which point the employer/carrier applies to the Division of Federal Employees' Compensation (FEC) Branch of Special Claims, for reimbursement from the FECA Compensation Fund under provisions of the WHCA (see 5 U.S.C. §8147, the statute that establishes the Compensation Fund). Thus, the DBA provides a system by which carriers/self-insured employers are reimbursed for losses that they may have covered, once the injury/death is determined to have been caused by a war risk hazard.

Under Section 101 of the WHCA, if an employee was not eligible for benefits under the DBA, but was injured or died as a result of a war-risk hazard, the employee or his survivors may claim under the WHCA directly. It's important to note that 20 C.F.R. §610.100(b) provides that the DOL shall not provide reimbursement in any case in which an additional premium for war-risk hazard was charged. 20 C.F.R. 61.100(b)

The website for the Office Workers' Compensation Programs has a link to the Index of Resources About Claims Under the Federal Employees' Compensation Act (Index is hosted by The Fien Group). The Index of Resources website has a link to Program Procedures, Special Case Procedures. Chapter 4-0300 outlines the procedures to follow in making claims under the WHCA. Section 8 of that chapter addresses terrorist attacks. As stated on the Fien Group's website, although the statutory definition of a war-risk hazard does not specifically address terrorist attacks, coverage may be extended to some victims of terrorist acts. The Group provides some examples to demonstrate the potential for coverage.

### **The Source of Benefits**

Perhaps one of the first questions asked by a contractor who is sending employees abroad to perform work that is covered under the DBA is: from where do the benefits come that are paid to the employee in the event of death or injury? Each employer who has employees covered by the LHWCA or one of its extensions (in this case, the DBA) must secure its obligation to provide compensation and medical benefits in accordance with section 32 of the Act (see 33 U.S.C. §932). A contractor must secure the obligation of its subcontractor unless the subcontractor has secured its own obligations under the Act(s). Thus the simple answer is that the benefits come from insurance that the employer secures.

Every employer carrying on covered employment is required to secure its obligation to pay compensation and provide medical care to injured employees by one of two ways: insuring with any insurance company **authorized** by the Office of Workers' Compensation Programs of the DOL; or by becoming an authorized self-insurer.

### **Authorization of Insurance Carriers and Self-insurers**

The LHWCA Procedure Manual, Chapter 7-200, contains the regulations and procedures regarding authorization of insurance carriers and self-insured employers. A brief explanation of the requirements follows.

To receive initial authorization under the LHWCA or one of its extensions (such as the DBA), an insurance company should have five years' experience in writing workers' compensation coverage and should be listed in Best's Insurance Reports with a rating of "B+" or better. An application for authority to issue insurance coverage must be submitted in writing and be signed by an officer of the applicant. "Every applicant for authority to write insurance under provisions of [the LHWCA] . . . shall be deemed to have included in its application an agreement that the acceptance by the [District Director of the DLHWC] of a report of the issuance of a policy of insurance . . . shall bind the carrier to full liability for the obligations under the Act or its extensions of the employer named in the [report of issuance of a policy of insurance], as well as the distinct

obligations imposed on the carriers themselves by the Act.” LHWCA Procedure Manual, Ch 7-300, para. 9.

The Office of Workers’ Compensation Programs will authorize an employer to self-insure obligations under the Act or its extensions when the company has established that it has:

- Ample financial resources to meet all obligations in regard to its potential liability under the Act
- Obtained adequate excess or catastrophic loss insurance
- Made adequate arrangements to provide prompt authorization and payment for all necessary medical care
- Made a security deposit in the name of the OWCP in the manner and amount prescribed by the OWCP
- Agreed to carry out all requirements of the Act and the regulations for administering the Act under which authorization is sought.

### **Uninsured Employers and Penalties**

Section 38(a) of the LHWCA (see 33 U.S.C. §938) provides that any covered employer failing to secure compensation shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not more than \$10,000, or by imprisonment of not more than one year, or both. The LHWCA Procedure Manual describes various ways in which an “uninsured employer” situation can arise. One example is that a credible source contacts the District Office to report that an employer is operating in the Compensation District without the required insurance. Although this situation typically arises in the context of admiralty, the same reporting could occur from any contractor employee who is covered under the DBA. Another example given is that an injured worker contacts the District Office to request assistance in filing a claim for benefits, and the Office does not have a report of injury from the employer and cannot otherwise identify the employer.

The exclusivity of the workers’ compensation remedy, provided for in section 5(a) of the Act (see 33 U.S.C. § 905), does not apply “if an employer fails to secure payment of compensation as required by this Act.” In such situation, an injured employee, or legal representative, may elect to claim compensation under the Act, or to maintain an action at law (or in admiralty) for damages on account of such injury or death.

### **Regulations and Information Resources**

Most of the following is guidance for getting information from the internet about the workers’ compensation laws. The DOL hosts a very informative website. The information below is intended to help users find pertinent information more quickly.

The homepage for the DOL is at [www.dol.gov](http://www.dol.gov). Basic information about the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §901 and 20 C.F.R. §§701-704) is at [www.dol.gov/asp/programs/handbook/longshor.htm](http://www.dol.gov/asp/programs/handbook/longshor.htm).

The Office of Workers' Compensation Programs' Division of Longshore and Harbor Workers' Compensation administers the LHWCA and its extensions, including the Defense Base Act. The OWCP's website is at [www.dol.gov/esa/owcp\\_org.htm](http://www.dol.gov/esa/owcp_org.htm).

The Division of Longshore and Harbor Workers' Compensation website is at [www.dol.gov/esa/owcp/dlhwc/1stable.htm](http://www.dol.gov/esa/owcp/dlhwc/1stable.htm). On the Division's homepage, under Other Longshore Information, there is a link to authorized insurance carriers and self-insured employers. Contact the Longshore National Office at (202) 693-0038 to get information about authorizations for specific carriers. Also, under Other Longshore Information, there is a link to the previously mentioned DLHWC Procedure Manual.

On the Division's homepage, under About DLHWC, there is a link to contacts as well as other helpful information about claims and customer assistance.

The DOL's Office of Administrative Law Judges homepage is at [www.oalj.dol.gov](http://www.oalj.dol.gov). That page has links to the OALJ Law Library and to the 2002 Longshore Judges' Benchbook. The Benchbook contains information about claims under the DBA extension of the LHWCA.

The DOL has promulgated regulations for the implementation of the War Hazards Compensation Act in Part 61 of Title 20 of the Code of Federal Regulations. (Title 20, Chapter I, subchapter F, Part 61)

The Point of Contact for this subject in the CECOM Legal Office is the undersigned, DSN 879-0662, (520) 538-0662.

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