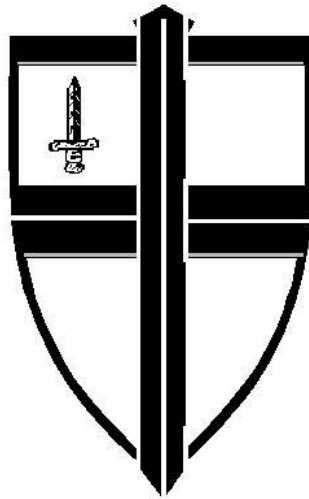


Longshore Solutions

A Series of Three Articles

A Special Reprint from the Florida Marine Contractors Association
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Longshore Solutions -- First in a series by FMCA professional member Ian Greenway

Despite the introduction in Washington last month of legislation to remove Recreational Marine Contractors from the Longshore act, right now it is clear that until those changes are made law, marine contractors are subject to the Longshore act and potentially Jones Act and other admiralty benefits. Add to that the increased enforcement by federal, state and local authorities, plus increased involvement of informed attorneys and it becomes vital to find an affordable solution for your business.

In this short series of articles, I would like to give some guidance on who is covered under the Longshore act, and how to find suitable and affordable solution.

Whilst the Longshore act does not specifically address Marine Contractors in its wording, the absence of a specific exclusion means you are covered, unless excluded. As such, we will start with the premise that everyone in your employment (and maybe some others) is covered and then we will focus on who or when they can be excluded.

CLERICAL employees are a numerated exclusion under the act, but only IF they spend all their time in clerical duties. So please keep them locked in the office!

SHOP WORK – work performed at a shop or yard well away from the water is not at a Longshore “situs” (fancy name for a location) and thus would be excluded.

WORK ON NON-NAVIGABLE WATERS – sounds easy at first, but the interpretation of navigable in Longshore is extremely broad (and has no relationship to coastguard or any other definition). It includes not only the Intercoastal and other man-made waterways, but also many bays, canals, and inlets in which you could hardly float a canoe! Even the Everglades have been considered navigable. So again, it is easier to consider what is not navigable. In Florida that would only be a land locked lake or pond, with no river or other water connection (except to another land locked lake or pond). These are few and far between and these present such a minor opportunity for profitable marine contracting as to be almost non-existent in most areas.

RETAINING SEAWALLS – a Court does set a precedent in our district that under certain circumstances an employee building a retaining seawall is not a longshore employee and thus can be excluded. The test boils down to a set of facts...

- The structure must be used **EXCLUSIVELY** to hold back the land from eroding into the water
- All work must be performed from land (no use of a vessel)
- There must be no connection between the structure and any form of docking (davits/ties/dock etc)
- The job must be independent to any Dock/Davit/etc covered job?

This is a tough test but I am sure that some of your jobs can be excluded on this basis.

LEASING COMPANIES/P.E.O.'s - many contractors have found leasing was the right for them. Certain leasing companies turned a blind eye to the Longshore exposure, and thus offered a very competitive product.

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However those companies are now almost non-existent. Furthermore even the professional, quality, leasing companies who identified and charged for the Longshore exposure is becoming scarcer. If you are currently in a leasing arrangement, I would strongly recommend that you have some other options working, just in case that leasing company is unable to continue on your exposure.

SUBCONTRACTORS - Another issue of great concern is the exposure from subcontractors... Independent or not, Longshore does not care. There is a direct pass through of any uninsured exposure from a subcontractor to you. Further, even without a claim, you could be faced with a huge audit if you cannot prove your subcontractors had valid Longshore coverage at the time of your audit. If you subcontract any work today, you should require a copy of the certificate of insurance from them showing it includes Longshore coverage with an approved Longshore carrier. If you are not comfortable reading a certificate, ask your agent if they will help ... keep a file of these certificates around so when the auditor comes in, you have them immediately to hand. Paperwork is never fun (even for insurance people) but a well organized certificate file can potentially save you thousands in premiums or possibly tens of thousands in the event of an uninsured injury.

Remember, the penalties for not having Longshore are severe... not only are there fines, and personal liability for unpaid benefits, but you also lose that "sole remedy" protection under the act, which means your employee can sue under a tort action, an even more rewarding route.

In future articles in this short series we will talk about controlling the cost of coverage, and give you some insider tips and tools to find the right coverage at an affordable price. We will discuss allocating payroll, class codes, the records you should keep, officer exclusions, drug free, safety and other available credits, your modifier, estimating payrolls and finally your exposure to admiralty/Jones act claims.

EDITORS NOTE:

Ian Greenway is president and CEO of LIG Marine Manager. He has worked extensively with the Longshore Act and is a nationally known speaker and trainer on the subject. He is the author of Navigating Marine Workers Compensation and Navigating Marine Insurance. Ian is a most respected member of the MIAASF joint Longshore Committee and serves on that Committee with FMCA President Bob Cayce and Executive Director Ed Day. He has kindly agreed to do this educational series on Insurance Considerations.

He has asked us to point out that his company is not an insurance agency and as such he cannot accept submissions from contractors. He is however actively involved in underwriting this class of business and has offered to answer any individual questions confidentially and by e-mail – he can be reached at IRG@LIGInsurance.com

Longshore Solutions: The second in a series by Ian Greenway

In last month's article we covered who is, and who is not subject to Longshore coverage. We now look at what goes into your cost of insurance and how you can control it. Before we start however, I must tell you of **the latest news**. The State of Florida finally approved a whole new set of rates effective August 1st 2002. If your new or renewal policy is effective August 1st or later, these rates will apply. The overall rates rise is 2.5%, but individual changes vary as indicated in the chart below. The good, (albeit small) news is the Longshore loading decreased from 2.98 to 2.95 – not a huge change, but at least it's going in the right direction.

Classifications:

Probably the single largest factor in your premium is the classifications used by your agent/company to calculate them. There are a set of industry codes designed by an organization called NCCI and contained in a reference manual called "scopes". If you were a marina, boat builder or printer you could simply go to the scopes, and quickly and reliably find the right code for you. The problem is that there are not codes for "Marine Contractors" or "Dock and Seawall building" so the problem is compounded for you. So the key here is to work with your agent and carrier to find the right codes for your operation. I would strongly suggest asking your agent for copies of any scopes classifications they are recommending for you, and the applicable rates. The chart below shows some of the most common codes for the industry and their current gross rates. Look and see what best fits your business:

Class	Description	Pre Aug 1 st 2002		Aug 1 st 2002+beyond	
		State	Longshore	State	Longshore
6005	Jetty & Breakwater	14.94	59.46	14.42	56.96
5403	Carpentry noc	28.80	114.62	30.39	120.04
6003	Pile Driving	62.53	248.87	57.57	227.40
5183	Plumbing	10.75	42.79	11.67	46.10
3632	Electrical	8.66	34.47	9.47	37.41
5213	Concrete Construction	33.02	131.42	32.31	127.62

(Approximate rates only – all rates are per \$100 of payroll)

Payroll Splitting:

The simplest way for any business to properly split payroll is to assign one person to one job, and to leave them exclusively in that job. This is simple, but frequently impossible. NCCI does allow payroll splitting but requires:

"The employer maintains proper payroll records which disclose the actual payroll by classification for each such individual employee. Such records must reflect the actual time spent working within each job classification and an average hourly wage comparable to the wage rates for such employees within the employer's industry. An estimated or percentage allocation of payroll is not permitted. If original payroll records do not disclose the actual payroll applicable to each classification, the entire payroll of the individual employee shall be assigned to the highest rated classification that represents any part of his or her work"

Payroll estimation works well up front, but watch out, these estimates are going to be the subject of a payroll audit at expiration, and so the right documentation is vital. Let's say we have a carpenter who splits his time 50/50 between working on deck at the back of residences and carpentry on navigable waters. He makes for this example \$25,000 a year in payroll and would be assigned under classification 5403. Before any credits/modifications:

PAYROLL SPLIT: (using 8/1/2002 rates)

\$12,500 @ \$28.80 per \$100 = \$ 3,600
 \$12,500 @ \$114.62 per \$100 = \$14,328

NO PAYROLL SPLIT:

\$25,000 @ \$114.62 per \$100 = \$28,655
 Saving with payroll split = \$10,727

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Now multiply that by 10 employees and the savings exceed \$100,000! No one enjoys the paperwork but you can see how much money you can save! Remember, this also applies to splitting between two different classifications, not just Longshore and non-Longshore. Also remember that the premium portion of overtime work is deductible, so keep that portion of payroll separate.

Office Exclusions:

Common in State Act, are not available if the "officer" performs the Longshore work himself.

Experience Modification:

If you have had conventional insurance for 2 years or more, you should qualify for an experience mod. This reflects how the losses in your business compare to the standards in your classification(s). An experience modification of 1.00 means that either there is inadequate data for NCCI to establish a mod for you, or that you are exactly the norm for similar businesses. A credit mod (and we have clients with mods down as low as .61) is a mod below 1.00 and demonstrates that your loss experience is better than the average. A mod above 1.00 shows your losses are worse than average. That mod directly changes your premium and as such a credit mod clearly can save you a significant amount of money. When you get your mod, you or your agent should review it against prior payroll audits to make sure the data is accurate. Often, payroll is missing and correcting that can directly reduce your premiums retroactively to the mod's effect date.

Drug & Safety Credits:

If you operate drug free and safety programs in accordance with the state rules, you will be given 5% and 2% credits, respectively, off your premium. While these are not huge amounts in their own rights, they do go directly to the bottom line. In addition, I would suggest by having these programs, you will in the long run reduce your claims and thus reduce your modifier accordingly.

Estimating Payrolls:

One of the tough questions at each renewal your agent will ask is what your payroll estimates are for the coming year. Issues of payroll splitting discussed above are critical, (as well as being able to support it at audit), but also critical is the philosophy you want to adopt. If you put forward an optimistic estimate, and then if you do not meet those numbers, you will have overpaid the insurance company and will have to wait until a few months after expiry to see that cash back. If you put in a conservative number and then exceed those substantially, you should expect a large audit at expiry, which you will have to pay in one large lump sum, possibly hurting cash flow. If that falls past your year-end, you will effectively have inflated your profits for the prior year and paid tax on those. One option is to calculate monthly or quarterly what your actual "AUDITED" premiums should be, and then put in a separate bank account any overage so you have the funds when needed. Alternately, you can request a voluntary audit by your carrier mid term.

Your WC/Longshore premium is likely to be your second or third largest business expense (after payroll) and whilst none of these techniques are going to change that, each can assist you in controlling these costs. Every minute you take to learn about them and discuss them with your agent, will, in the long term, pay you dividends.

In the final article in the series we will discuss your exposure to Jones act and other Admiralty liabilities to your employees and how to properly cover it.

Ian Greenway is president and CEO of LIG Marine Manager. He has worked extensively with the Longshore Act and is a nationally known speaker and trainer on the subject. He is the author of Navigating Marine Workers Compensation and Navigating Marine Insurance. He has asked us to point out that his company is not an insurance agency and as such he cannot accept submissions from contractors. He is however actively involved in underwriting this class of business and has offered to answer any individual questions confidentially and by e-mail – he can be reached at IRG@LIGInsurance.com

Longshore Solutions – The third and final in a series by Ian Greenway

Over the first two articles, I have shown you who is and who is not exposed to Longshore, but unfortunately that is not the only exposure you have to your employees. Most often known by its most notorious part, "The Jones Act", Admiralty law provides a set of remedies to injured "Master and Crew" of a vessel, and is full of misconceptions and myths. In this article I will try to dispel some of the myths, and show that if your employees own, operate or work from just about anything that floats, you may have this exposure.

Myth #1 This only applies if I go offshore

It applies to all inland and coastal waters as well as offshore, just the same as Longshore.

Myth #2 I am exempt from Longshore so I do not need Admiralty coverage!

The Longshore exemptions do not apply to any admiralty coverages.

Myth #3 I have Longshore coverage so my employees are covered

If an employee brings suit under Admiralty law, a Longshore carrier will deny coverage and will not even offer a defense.

Myth #4 I need Jones Act Insurance

Jones act is only one of a series of actions available. Maintenance and Cure, Wrongful Death, Unseaworthiness, Death on the High seas Act, Wrongful Death...You will need a policy that covers ALL these actions.

Myth #5 I have P&I insurance – I am covered

Possibly. All P&I policies provide coverage for injuries to 3rd parties, but some exclude your employees &/or employees of your contractors or subcontractors. Watch out for these exclusions as they are often buried deep in the back of the policy.

Myth #6 MEL (maritime employers liability) and P&I are the same

MEL only covers injuries to your employees.
P&I covers injuries to third parties and POSSIBLY your employees.
(See #5)

Myth #7 MEL covers Longshore

Absolutely not, although some unscrupulous people may tell you otherwise.

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Myth #8 Employees must spend more than 30% of their time on a vessel to qualify

There is case law that suggests this, but it has been frequently overruled right down to an employee's first day of a 7-day job!

Myth #9 Employees must "ride" the vessel to qualify

The vessel can be entirely stationary and never move.

Myth #10 The vessel must be powered, or Coast Guard registered

There are no restrictions on power, length, registration, or anything else – a small workboat has been held to be a "vessel" under Admiralty law.

If you put anyone aboard a vessel, owned or non-owned, they can file suit under admiralty law, and if you do not have the right coverage, not only will you have no one to cover you, but also no one to defend you. Defense in Federal court is a high cost item, and even if successful, could easily run up to 6 figures out of your pocket.

Unlike WC and Longshore there are no laws that require you to carry Admiralty coverage, just like there is no law that requires you to carry GL. However not many WC/Longshore underwriters will knowingly accept a risk with uninsured Admiralty exposures.

With this exposure and without this coverage, you are holding your business out to ransom for the first injured person that is on the vessel, and his attorney!

Ian R. Greenway June 2002

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