

DEFENSE BASE ACT

WORKERS' COMPENSATION FOR EMPLOYEES OF U.S. GOVERNMENT CONTRACTORS WORKING OVERSEAS

Federal law requires all U.S. government contractors and subcontractors to secure workers' compensation insurance for their employees working overseas. The related statutes include the Defense Base Act, 42 U.S.C. §§ 1651-54 and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50. Implementing regulations can be found at 20 C.F.R. Parts 701, 702, 703 and 704. The Federal Acquisition Regulation (FAR) also sets out the workers' compensation insurance requirements for all overseas contracts at 48 C.F.R. § 28.305 and at § 52-228-3 and § 52-228-4.

The U.S. Department of Labor, Office of Workers' Compensation Programs (OWCP), Division of Longshore and Harbor Workers' Compensation, administers the Defense Base Act, ensuring that workers' compensation benefits are provided for covered employees promptly and correctly.

Coverage under the Defense Base Act

The Defense Base Act covers the following employment activities:

- Working for private employers on U.S. military bases or on any lands used by the U.S. for military purposes outside of the United States, including those in U.S. Territories and possessions;
- Working on public work contracts with any U.S. government agency, including construction and service contracts in connection with national defense or with war activities outside the United States;
- Working on contracts approved and funded by the U.S. under the Foreign Assistance Act, generally providing for cash sale of military equipment, materials, and services to its allies, if the contract is performed outside of the United States;
- Working for American employers providing welfare or similar services outside of the United States for the benefit of the Armed Forces, e.g. the USO.

If any one of the above criteria is met, all employees engaged in such employment, regardless of nationality, are covered under the Act.

Insurance Requirements

Sections 1(a)(4) and (5) of the Defense Base Act, 42 U.S.C. §§ 1651(a)(4) – (5), provide that every contract coming within the purview of the Act:

“shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such Public work under such contract the payment of compensation and other benefits under the provisions of this Act, and (2) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, ...”

The Defense Base Act (DBA) adopts the provisions of the Longshore and Harbor Workers’ Compensation Act (LHWCA) with but a few exceptions. The insurance requirements for the DBA are identical to those found in the LHWCA.

Section 32(a) of the Longshore Act requires every employer either to secure insurance for the payment of workers’ compensation benefits provided under the Act or to be permissibly self-insured. The OWCP is responsible for the authorization of insurance carriers and self-insurance of employers. For a list of the over 700 insurance carriers and self-insured employers currently authorized, see <http://www.dol.gov/esa/owcp/dlhwc/lscarrrier.htm>. Three major insurance carriers are currently providing Defense Base Act insurance coverage. They are ACE-USA, AIG, and CNA.

Section 4(a) of the Act requires every employer to be liable for, and to secure the payment of, disability, medical, and death benefits to its employees in the event of injury or death. If a subcontractor fails to secure the payment of compensation, the contractor will be liable for and be required to secure the payment of such benefits.

Section 5(a) of the Act provides that “a contractor shall be deemed the employer of a subcontractor’s employees ... if the subcontractor fails to secure the payment of compensation....”

Section 5(a) also provides that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his survivors in case death results from the injury, may elect to sue the employer for tort damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

Section 38(a) provides that an employer who fails to secure the payment of compensation when required shall be guilty of a misdemeanor and, upon conviction thereof, shall be

punished by a fine of not more than \$11,000 or by imprisonment for not more than one year, or both. And if the employer is a corporation, the president, secretary, and treasurer shall be also severally liable for such fine and imprisonment.

Furthermore, if a corporation fails to secure the payment of compensation, the president, secretary, and treasurer shall be severally and personally liable, jointly with the corporation, for any compensation or other benefits payable under the Act in respect to any injury or death which may occur to any of its employees.

Defense Base Act Waivers

Upon the written request of the head of any department or other agency of the United States, the Secretary of Labor may waive the application of the Defense Base Act with respect to any contract, work location, or class of employees. The request for waiver must be made by the government agency to the Department of Labor (DOL), OWCP. It is Department of Labor policy that the waiver does not apply to citizens or legal residents of the U.S. or to employees hired in the U.S. Once granted, the waiver is only valid if alternative workers' compensation benefits are provided to the waived employees pursuant to applicable local law.

Benefits under the Defense Base Act

The Defense Base Act provides disability, medical, and death benefits to covered employees injured or killed in the course of employment, whether or not the injury or death occurred during work hours. Compensation for total disability is two-thirds of the employee's average weekly earnings, up to a current maximum of \$1,030.78 per week. Compensation also is payable for partial loss of earnings. Death benefits are half of the employee's average weekly earnings to the surviving spouse or to one child, and two-thirds of earnings for two or more such survivors, up to the current maximum weekly rate. Permanent total disability and death benefits may be payable for life, and are subject to annual cost of living adjustments. There is no minimum compensation rate.

Permanent disability and death benefits payable to aliens and non-U.S. residents may be commuted by payment of half of the present value of future compensation, as determined by the OWCP district director.

The injured employee is entitled to medical treatment by a physician of his/her choice, as the injury may require. Medical benefits may not be commuted.

Procedures for Reporting Injuries and Filing Claims

Two OWCP district offices have primary responsibility for injuries arising under the Defense Base Act: the New York district office and the Honolulu district office. For jurisdictional boundaries, see <http://www.dol.gov/esa/contacts/owcp/ny/distof~1.htm>. For district office addresses, see <http://www.dol.gov/esa/owcp/dlhwc/lcontac.htm>.

The employer should notify its insurance carrier, or if it is self-insured the claims administrator, as soon as it has knowledge of an injury. Medical treatment if needed should be authorized immediately. An Employer's First Report of Injury, Form LS-202, must be filed with the OWCP district office having jurisdiction within 10 days of the injury, if it causes loss of one or more work shifts. The Form LS-202 may be filed electronically. For information and instructions, go to <http://www.dol.gov/esa/owcp/dlhwc/lforms.htm>

Additional forms and notices, as well as medical reports, should be filed with the OWCP as regulations require.

A written claim for benefits must be filed in the office of the OWCP district director within one year of the injury or within one year from the last payment of compensation, whichever is later.

The OWCP district office monitors the payment of compensation and medical care to ensure compliance with the provisions of the Act. Its staff provides technical assistance to employers, insurance carriers, and benefit claimants for the prompt delivery of benefits. In case of claims disputes, OWCP claims examiners conduct informal conferences to help the parties resolve their disputes by way of mutual agreement or compromise without formal litigation. The district director has authority to approve settlements and issue compensation awards in undisputed claims.

If the parties are unable to resolve their disputes informally, they may request the referral of the claim to the Office of Administrative Law Judges for formal hearing. Decisions of the administrative law judge are appealable to the Benefits Review Board, and thereafter to the U.S. District Court or to the U.S. Court of Appeals.

Defense Base Act Seminars and Workshops

The OWCP National Office and district offices hold periodic seminars and workshops for industry groups as the need arises, or upon request. For information on upcoming events, check the official Longshore website at <http://www.dol.gov/esa/owcp/dlhwc/lstable.htm>.

Resources and Useful Links

OWCP/Longshore Website <http://www.dol.gov/esa/owcp/dlhwc/lstable.htm>

OWCP/Longshore Contacts <http://www.dol.gov/esa/owcp/dlhwc/lcontac.htm>

District Offices with DBA jurisdiction
<http://www.dol.gov/esa/contacts/owcp/ny/distof~1.htm>

Copy of the Defense Base Act
<http://www.dol.gov/esa/owcp/dlhwc/dba.htm>

Copy of the Longshore Act <http://www.dol.gov/esa/regs/compliance/owcp/lhwca.htm>

Copy of the Longshore Regulations at 20 C.F.R. Parts 701 to 704.
http://www.dol.gov/dol/allcfr/Title_20/Chapter_VI.htm

Copy of the Longshore Procedure Manual
<http://www.dol.gov/esa/owcp/dlhwc/lspm/pmtoc.htm>

Longshore Forms <http://www.dol.gov/esa/owcp/dlhwc/lforms.htm>

List of Authorized Longshore Insurance Carriers and Self-Insured Employers
<http://www.dol.gov/esa/owcp/dlhwc/lscarrier.htm>

Maximum Compensation Rate and Annual Adjustment Table
<http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm>