

GOVERNMENT AND REGULATORY AFFAIRS

BLAST

Insurance Coverage and the Defense Base Act *Longshore and Harbor Workers Compensation Act and Extensions*

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STATUTE/REGULATION SOURCE

To learn more, visit <http://www.dol.gov/owcp/dlhwc/lbdba.htm>

BRIEF DESCRIPTION

Understanding what kinds of activities fall under the Defense Base Act (extension of the Longshore and Harbor Workers Compensation Act), and identify whether existing insurance coverage is sufficient and in compliance with regulations.

The U.S. Department of Labor's general overview of the law states:

- The Defense Base Act provides workers' compensation protection to civilian employees working outside the United States on US military bases or under a contract with the U.S. government for public works or for national defense.
- Federal law requires all U.S. government contractors and subcontractors to secure workers' compensation insurance for their employees working overseas.

POTENTIAL/ACTUAL IMPACT

Section 38(a) of the Act provides that any employer who fails to secure coverage in accordance with statute and regulations when required shall be guilty of a misdemeanor and, punishable by a fine of not more than \$10,000 or imprisonment of not more than one year, or both. Moreover, if a corporation fails to secure coverage the president, secretary, or treasurer shall be severally and personally liable. In addition penalties may be assessed where an employer fails to report in a timely manner any injury or death of its employees.

DISCUSSION

The Defense Base Act covers the following employment activities:

- Working for private employers on US military bases, or on any lands used by the US for military purposes outside of the US including those in US Territories and its possessions.
- Working on public work contracts with any US government agency, including construction and service contracts in connection with national defense, or with war activities outside the US.
- Working on contracts approved and funded by the US 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 US.
- Working for American employers providing welfare or similar services outside of the US for the benefit of the Armed Forces, e.g. the USO.

If any of the above criteria are met then all employees engaged in such activity, no matter the duration and regardless of nationality, are covered under this Act. DBA is an exclusive remedy. There is no concurrent jurisdiction between DBA and a State Workers' Compensation Statute. DBA applies to all individuals who meet the criteria including subcontractors and CEO's. If subcontractors don't carry DBA coverage then the primary contractor is responsible regardless of tier.

Unlike many state workers compensation programs where there needs to be a causal relationship between the job duties and the injuries, under the "Zone of Special Danger" doctrine, courts have included injuries and deaths that occur outside of regularly assigned job duties or work hours to be covered under DBA. All that is required is that the "obligation or condition" of employment create "the zone of special danger" from which the injury arose.

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DBA coverage grants and contracts:

- Regardless of whether service is provided through a grant or a contract, if the activity occurs on a US military base, DBA coverage is required.
- For other activities, DBA coverage is determined by the definition of contract or grant.
- 2001 case law: if the purpose of the “grant” is for the benefit of the US Government, then it is a contract regardless of what the parties call it, and DBA coverage applies.

EXAMPLE

Any public works contracts funded by the United States government for work performed by a college or university on overseas American military bases and overseas military-related installations.

ACTION

Suggested action steps may include:

- Review scope of operations. Do you have employees and faculty traveling internationally, including US Territories and its possessions? Do they meet the criteria described above?
- Be aware of definitions of a grant, a contract, and a public work. Review existing relationships/ grants/ contracts to determine whether you may fall under these definitions.
- Make sure that your insurance broker is sufficiently educated in this area, and make sure that any legal advice you receive is from legal counsel experienced in DBA coverage issues.
- Review existing workers’ compensation insurance coverage. Is it broad enough given your scope of operations?
- If you wish to self-insure you have to receive approval from the US DOL, OWCP. (See section 32(1-2).) You cannot rely on your in state self-insurance permit to be in compliance with DBA regulations.

SOURCES AND REFERENCES

1. “Division of Longshore and harbor Workers’ Compensation (DLHWC),” last modified November 06, 2013, <http://www.dol.gov/owcp/dlhwc/lbdba.htm> .
2. Henry Schramm II, Keith Flicker “Defense Base Act Insurance (DBA) and Related Global Coverage” (presented during URMIA’s online webinar, “Defense Base Act and Higher Education” January 2012).
3. Raciborski v. Cooperative Housing Foundation and Cigna Insurance, 35 BRBS 455 (ALJ 2001), LexisNexis
4. “Defense Base Act (DBA) Frequently Asked Questions (FAQ),” last modified November 06, 2013, <http://www.dol.gov/owcp/dlhwc/DBAFaqs.htm> .
5. For further information about DBA insurance or self-insurance contact the OWCP Longshore National Office at 202 693 0038 or Email: DLHWC-Public@dol.gov.

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