

# **The Fisheries Observer Compensation Act<sup>1</sup>**

**(Annotated with footnotes)**

## **§ 1. Compensation authorized**

Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, 33 U.S.C. 901, et seq.,<sup>2</sup> shall apply in respect to the injury<sup>3</sup> or death of any person engaged in any employment as a fisheries observer, as defined below, irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.<sup>4</sup>

## **§ 2. Definitions.** As used in this Act—

(a) The term “fisheries observer” means a person under contract or otherwise engaged in employment as an observer in connection with a fish or fisheries monitoring program created by or pursuant to a law of the United States. The provisions of the Federal Employee Compensation Act (5 U.S.C. 8101 et seq.<sup>5</sup>) shall not apply to injuries or death covered under this Act occurring after the effective date of this Act, even if the injured or deceased fisheries observer is deemed a federal employee for any other purpose. A fisheries observer shall not be deemed to be a master, member of a crew, or seaman of the vessel to which the observer is assigned to perform any functions in connection with a program for the monitoring of fish or fisheries created by or pursuant to a law of the United States. A person employed exclusively to perform office, clerical, secretarial, security, or data processing work shall not be deemed a fisheries observer.<sup>6</sup>

(b) The term “employee” means a fisheries observer, as defined above.

(c) The term “employer” means a person that contracts with or otherwise hires one or more fisheries observers, and may be the United States government, or an agency, corporation or instrumentality thereof, or a contractor, subcontractor, or an entity certified or accredited by the United States government to provide fisheries observers, or other person.<sup>7</sup> Neither a vessel nor the United States government shall be deemed to be the employer of a fisheries observer unless the United States government or the vessel directly contracted with or otherwise hired the observer for the provision of his services as a fisheries observer, and pays the salary of that observer directly to that observer.<sup>8</sup>

(d) The term “effective date” means 11:59 p.m., Eastern Standard Time, on the day on which the Act becomes law.

## **§ 3. Liability for compensation**

An employer shall be liable for the payment to his employees of the compensation payable under 33 U.S.C. 907, 908, and 909, subject to the provisions of this Act.<sup>9</sup> In the

case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor. Compensation shall be payable irrespective of fault as a cause for the injury.<sup>10</sup>

**§ 4. Coverage.** Compensation shall be payable under this chapter in respect to disability or death of an employee if the disability or death results from an injury occurring while the employee is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person (a) while that person is aboard, boarding or leaving a vessel to which he is assigned to engage in activities as a fisheries observer, (b) while that person is otherwise engaged in employment as a fisheries observer in any location, on land or otherwise, or (c) during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.<sup>11</sup> No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. Subject to the provisions of 33 U.S.C. 933 but otherwise notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act shall be credited against any liability imposed by this chapter. Unless provided for herein, no other provisions of 33 U.S.C. 903 are applicable to this Act. For any injury or death that occurs on or after the effective date of this Act, the liability under this Act shall become applicable to contracts and subcontracts heretofore entered into but not completed at the time of the effective date of this Act.

**§ 5. Computation of benefits; application to aliens and nonnationals**

(a) The minimum limit on weekly compensation for disability, established by 33 U.S.C. 906(b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by 33 U.S.C. 909(e) shall not apply in computing compensation and death benefits under this Act.<sup>12</sup>

(b) Compensation for permanent total or permanent partial disability under 33 U.S.C. 908(c)(21), or for death under this Act to aliens and nonnationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of the injury, and except that the United States Employees' Compensation Commission [Secretary of Labor] may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or nonnationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission [Secretary of Labor].<sup>13</sup>

## **§ 6. Exclusiveness of liability**

**(a) Liability of employer; failure of employer to secure payment of compensation.** The liability of an employer prescribed in 33 U.S.C. 904 and this Act shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, spouse, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action for 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 or comparative negligence of the employee.<sup>14</sup>

**(b) Prohibition of Negligence Claims against Vessel.** A fishery observer who suffers injury or death aboard a vessel to which he is assigned to perform duties as a fisheries observer shall have no cause of action against that vessel<sup>15</sup> for negligence or otherwise, except in cases where the vessel acted willfully in causing the injury or death. In no event shall the employer indemnify or otherwise be liable to the vessel for such claim, directly or indirectly, and any agreements or warranties to the contrary shall be void. No other provisions of 33 U.S.C. 905 are applicable to this Act. No provision of 33 U.S.C. 933 that is inconsistent with this subsection shall apply to this Act.<sup>16</sup> Nothing in this subsection shall prevent recovery under this Act against a vessel that is the employer of a fisheries observer.<sup>17</sup>

**(c) Limitation on federal government liability.** Unless the United States government is the employer of a fisheries observer, it shall not be liable for any damages arising out of any injury or death to a person that occurs while the person is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs. In those circumstances where the United States government is the employer of the observer, the liability of the government with respect to the injury or death to that person shall be limited to the remedies available in this Act.<sup>18</sup>

## **§ 7. Compensation districts; judicial proceedings**

**(a)** The United States Employees' Compensation Commission [Secretary of Labor] is authorized to extend compensation districts established under the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the United States Employees' Compensation Committee [Secretary of Labor] may deem necessary.<sup>19</sup>

**(b)** Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made

pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the location at which the injury or death occurs.<sup>20</sup>

**§ 8. Repeal of 16 U.S.C. 1881b(c).** Upon the effective date of this Act, 16 U.S.C. 1881b(c) is hereby prospectively repealed, and any fisheries observer who was deemed to be a federal employee for the purpose of compensation under the Federal Employee Compensation Act (5 U.S.C. 8101 et seq.) shall no longer have such status, with respect to any injury or death which occurs on or after the effective date of this Act, but instead shall be entitled to compensation pursuant to this Act for any injury or death that occurs on or after the effective date of this Act. However, this Act shall not apply to any injury or death that occurred prior to the effective date of this Act.<sup>21</sup>

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<sup>1</sup> The model here is the Defense Base Act, 16 U.S.C. 1651 et seq. (“DBA”), however we have customized the language to address the situation here, where we seek to have a statute that covers observers in all aspects of their employment as observers.

<sup>2</sup>This is the U.S. Code citation for the LHWCA.

<sup>3</sup>The LHWCA defines “injury” to include “accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury \* \* \*.” 33 U.S.C. 902(2),

<sup>4</sup>The intention here is to cover all observers in all observer-related activities, and to treat all observers the same, regardless of whether they are hired directly by the federal government or by a contractor or subcontractor.

<sup>5</sup>This is the U.S. Code citation for FECA.

<sup>6</sup>This is included because employees exclusively engaged in clerical work are excluded from coverage under LHWCA.

<sup>7</sup>The intention here is to put the responsibility on procuring LHWCA insurance on the entity that hires the observers, whether that is (1) the federal government because it hired the employee, or (2) a contractor with the federal government under a contract to provide observers, or (3) a non-contractor which hires observers that have been certified or accredited by the federal government, and which vessels pay to the entity to obtain the use of the observers.

<sup>8</sup>This clarifies the intention that neither the vessel nor the U.S. government be deemed the employer unless they directly hire the observer.

<sup>9</sup>This is adapted from 33 U.S.C. 904 of the LHWCA, and makes the payment provisions of LHWCA applicable to this Act.

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<sup>10</sup>This is from 33 U.S.C. 904. It is sufficiently critical that the no-fault provision of LHWCA needs to be restated in the new Act even though it is otherwise incorporated therein.

<sup>11</sup>While this is primarily based on the DBA and LHWCA, this language makes it clear that the coverage applies to all facets of the observers' duties, including land-based activities (such as a debriefing after a voyage). The intention is to have LHWCA provide all coverage and to avoid the need for state workers' compensation to apply to an observer. This is a desired result because: (1) it makes no sense to have potentially overlapping coverage under state workers compensation and LHWCA, (2) LHWCA is generally as good as or superior to all state workers' compensation programs, and (3) consistency and predictability are important objectives here.

<sup>12</sup>This is taken directly from the DBA. Note that these sections, which are being incorporated into this Act, also contain maximum limits, which are being adopted herein without modification.

<sup>13</sup>This too is taken directly from the DBA, and simplifies the payment of claims to aliens and non-nationals.

<sup>14</sup> This reflects the LHWCA, and clarifies that the employer is liable for compensation to the employee regardless of fault and because of exclusivity, the employee is prohibited from cause of action.

<sup>15</sup> The LWHCA defines "vessel" as follows: "Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charter, master, officer, or crew member." 33 U.S.C. 902(21).

<sup>16</sup> This goes beyond the LHWCA, which would allow claims for negligence against the vessel (but does not allow for claims for lack of seaworthiness). Under this Act, the employee would be prohibited from cause of action against the vessel.

<sup>17</sup>This is necessary for those instances, if any, where the vessel is the employer of the observer, i.e., where the vessel is the person that contracted with the observer for services and which directly pays the salary.

<sup>18</sup>This is not in the LHWCA. It is added here primarily to preclude claims for negligent training, defective equipment and the like against the U.S. government by observers who are hired by contractors or subcontractors but trained by the government or who use government supplied equipment.

<sup>19</sup>This taken directly from the DBA, and is included because it identifies the responsible party that can extend coverage to districts beyond U.S. territorial waters, since LHWCA coverage does not extend beyond U.S. territorial waters.

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<sup>20</sup> The LHWCA calls for direct appeals to the federal courts of appeal, while the DBA has a direct appeal to the federal district courts. I am assuming we want to retain the way that the DBA has handled it.

<sup>21</sup> Repeal is necessary so that observers are not covered under both FECA and LHWCA.