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I. The Longshore and Harbor Workers' Compensation Act

The Longshore and Harbor Workers' Compensation Act was enacted in order to provide compensation to injured workers or their dependents for disability or death due to an injury occurring over or adjoining the navigable waters of the United States. The Act provides that the employer must pay for the medical care required for its employee's injury, for disability compensation payments and for rehabilitation training. In the event of death caused by injury, benefits include payment for reasonable funeral expenses and compensation payments to surviving eligible dependents. Although the Act does not provide for compensation for non-economic losses, such as pain and suffering, compensation is payable regardless of whether the employer was "negligent" or "at fault" in causing a worker's injuries.

Injuries Covered by Workers' Compensation

The Longshore and Harbor Workers' Compensation Act applies to all injuries or occupational diseases which arise during the course of employment and which are related to that employment. You are eligible for workers' compensation regardless of your previous physical condition—for example, even if you have had a bad back or heart condition for many years, you are entitled to workers' compensation benefits if you re-injure, aggravate, or accelerate your back or heart condition during the course of your employment. In

addition, you can receive workers' compensation benefits even if your own negligence or carelessness contributed to your injury or death.

Notice of Injury

Under the law, an injured employee, or someone acting on his or her behalf, is required to give notice of the injury to the employer. Therefore, if you are injured on the job or suspect that you have an occupational disease, you should notify your employer of your injury or illness as soon as possible, preferably in writing. If you fail to notify your employer of your injury within 30 days, you may not be eligible for workers' compensation benefits.

Choice of Physicians

Your employer is responsible to authorize medical services to you after you give notice of your injury. You are permitted one free choice of physician to treat your injuries.

After that no change may be made without the consent of your employer or the United States Department of Labor. If the doctor you chose to treat you turns out not be of the appropriate specialty, another choice will generally be granted.

Unlike many state compensation laws, under the Longshore and Harbor Workers' Compensation Act, the employer can't compel you to choose from a list of doctors that it has selected. However, if you visit a doctor who is not your free choice physician or to whom you have not been referred by your free choice physician, you will be responsible for payment of the doctor's bill. The physician selected to treat you

is required to provide your employer and the Department of Labor with periodic updates concerning your medical condition and progress.

There is no limit on the duration that medical expenses can be paid as long as the need for medical treatment can be substantiated and related to the work-related injury or illness.

Medical benefits include hospital and physician bills, prescriptions, and reimbursement for travel to obtain medical treatment. As of January 1, 2018, the Department of Labor generally allows 54.5 cents per mile for mileage reimbursement.

When Weekly Benefits Should Begin

Compensation for time lost from work is payable on the 4th day after the onset of your disability. In cases where disability extends more than fourteen calendar days, compensation is paid for the three-day waiting period.

You should begin receiving weekly workers' compensation benefits within 14 days of the date you gave your employer notice of your injury. If you do not receive benefits within 14 days, or if your employer or the Department of Labor sends you a Notice of Controversion, you should immediately contact a lawyer, who will assist you in filing a Claim for benefits.

In general, your claim for benefits must be filed with the Department of Labor within one year of the date of injury or death.

Amount and Duration of Weekly Benefits: Temporary Total Disability Benefits

Under the Act, you are entitled to receive temporary total disability benefits if you are unable to perform your usual occupation for what is anticipated will be a limited period of time. If you are temporarily totally disabled, you will be paid weekly benefits equal to two-thirds of your average weekly wage subject to minimum or maximum compensation rates. The maximum and minimum compensation rates are set on October 1 of each year. The maximum compensation rate as of October 1, 2018 is $1,510.76 per week. The minimum compensation rate as of October 1, 2018 is $377.69 per week.

Temporary Partial Disability Benefits

You are considered temporarily partially disabled when you are only partially disabled to perform any type of work for an anticipated limited time period. In such case, you may be able to return to your original job part-time or to a lesser paying position. Alternatively, your employer may send you notification that you must look for modified work outside of the workplace. If you are partially disabled, you are entitled to receive weekly benefits equal to two-thirds of the difference between your average weekly wage and your "earning power"—the amount you are earning if you have returned to the workforce, or the amount that it is determined that you should be able to earn. Temporary partial disability benefits can continue for up to 5 years.

Permanent and Total Disability Benefits

You are considered permanently and totally disabled when you are unable to perform any type of employment for an indefinite period of time. You are entitled to a cost of living adjustment not to exceed 5% per year while you are on permanent total disability. The cost of living adjustment to permanent and total disability benefit recipients is set on October 1 of each year by the Department of Labor. The adjustment on October 1, 2018 was 2.65%.

Permanent Partial Disability Benefits

You are considered permanently partially disabled when you are partially disabled from performing any type of work for an indefinite period of time. In such a situation, your injury does not prevent you from performing some type of suitable alternative employment consistent with your functional capacity. Vocation services, including retraining and placement, are provided by the Department of Labor. Compensation for permanent partial disability is payable either on the basis of a scheduled award (see below) or a loss of earning capacity, depending on the anatomical parts of your body disabled by the work injury.

Specific Loss Benefits

The Act provides for limited term payments in cases where an employee suffers a permanent loss of use of parts of the body listed in the Act. A scheduled award can be paid even if you return to your pre-injury employment. A scheduled award may consist of the permanent loss or loss of use

of certain limbs or bodily functions, including vision and hearing. Calculation of the percentage of your loss of use is generally prepared by physician in consultation with the current edition of the *American Medical Association Guide to Permanent Impairment.* Disfigurements of the head, neck, face, or other exposed areas are also considered specific losses. The maximum disfigurement award is $7,500.00. If you have a specific loss, you are entitled to compensation in the amount of two-thirds of your average weekly wage, for the number of weeks set forth in the following chart:

Scheduled Award	**Weeks of Compensation**
Hand	244 weeks
Arm	312 weeks
Foot	205 weeks
Leg	288 weeks
Eye	160 weeks
Thumb	75 weeks
Index Finger	46 weeks
Middle Finger	30 weeks
Ring Finger	15 weeks
Little Finger	15 weeks
Great Toe	38 weeks
Other Toes	16 weeks
Hearing Loss—Both Ears	200 weeks
Hearing Loss—One Ear	52 weeks
Disfigurement	$7,500.00

or example, a person who has a 10% loss of use of a leg according to the AMA Guidelines will receive 28.8 weeks of additional weeks of compensation at a compensation rate determined by his average weekly wage.

Method of Computing Average Weekly Wage

It is important that you make sure that your employer has correctly calculated your average weekly wage. The amount of any compensation benefits to which you are entitled is equal to two-thirds of your average weekly wage subject to the maximum or minimum compensation rate. The most commonly applied computation of the average weekly wage involves dividing all payroll earnings received during the year prior to the injury by 52. Generally, any bonuses, incentives, vacation, or royalty payments that you earn are included in the calculation.

Alternative calculations may apply if your employment in the industry is seasonal or the usual calculation does not determine an appropriate average weekly wage at the time of injury.

If you have any questions about the correct calculation of your average weekly wage, or believe that your employer's calculation is incorrect, you should contact a lawyer or the Department of Labor as soon as possible since even a few dollars difference in your average weekly wage can mean thousands of dollars over the life of your claim.

Offset of Social Security Disability Benefits from Longshoreman's Compensation

Title II of the Social Security Act requires that Social Security disability benefits be offset from workers' compensation indemnity benefits. This means that the amount of your social security disability benefits may be reduced by the amount of any compensation weekly benefits that you receive during the period of your disability. On the other hand, there is no offset for "Old Age" Social Security retirement benefits against the amount of weekly workers' compensation benefits paid by your employer. If you have any question as to whether the offset applies to your case or is being properly calculated by Social Security, you should contact a lawyer.

Employee Work Verification

The Act requires you to report earnings from alternative employment. Accordingly, while you are out of work, your employer may send you a verification form to be completed and returned within 30 days. The verification form may request you to disclose the nature of your alternate employment, the dates of employment, and the amount of your earnings. If you do not accurately complete the verification form and return it within 30 days, your employer may suspend your benefits until the form is returned. If you provide your employer with intentionally false information, your employer may terminate your benefits or refer your claim for prosecution to the U. S. Attorney for fraud.

Medical Examinations

After you suffer a work injury, your employer may require you to submit to a medical examination by a doctor of its choosing. You may lose your right to compensation if you do not submit to medical examinations at reasonable intervals. If you receive a notice from your employer scheduling you for a medical examination or interview, you should consult an attorney as to whether you should attend, or have your own representative present during the examination, since employer requested evaluations may result in reduction or termination of your compensation benefits without prior notice or hearing for you.

What to Do If You Stop Receiving Benefits

If you stop receiving workers' compensation benefits, you should contact the Department of Labor or a lawyer immediately.

Medical Benefits

Your employer is responsible for paying all necessary and reasonable hospital, surgical, and medical expenses that you incur as the result of your work-related injury or illness. There are no restrictions on the length of time or the amount of medical benefits as long as the need for medical treatment can be substantiated and related to the work-related injury or illness. Medical benefits include prescriptions and travel to obtain medical treatment. As of January 1, 2006, the Department of Labor generally allows 44.5 cents per mile for mileage reimbursement.

Death Benefits

If you should die as a result of a work-related injury or illness, your surviving dependents are entitled to receive death benefits. The compensation rate will depend on your average weekly wage. In addition, death benefits include reasonable funeral expenses up to a maximum of $3,000.00.

Occupational Diseases

Occupational diseases include illnesses resulting from exposure to carcinogenic or toxic chemicals, asbestos, loud noises, excessive heat, stress, and other unsafe conditions present in the work environment. The result of prolonged exposure to these types of health hazards may include cancer, heart disease, neurological diseases, and loss of hearing. Disability resulting from an occupational disease is covered by the Act. Therefore, if you have an illness that you believe might have resulted from your work environment, you should ask your doctor about any possible connection between your illness and your job. If you suspect that you may have an occupational disease or as soon as your physician tells you that you have a work-related illness, you should notify your employer immediately.

You may be able to file your claim for occupational disease after your retirement from the industry. If you suspect that you have an occupational disease that has manifested itself after you have left the industry, you should contact a lawyer or the Department of Labor.

Settlements

In some instances, an agreement may be reached whereby the employer pays you a lump-sum cash payment instead of weekly compensation benefits that continue into the future. All settlements of this nature must be approved by the Department of Labor.

Pain and Suffering—Third Party Claims

Subject to the exception set forth below, the Act prohibits you from suing your employer for non-economic losses, such as pain and suffering, inconvenience, and loss of companionship, even if your employer's negligence or carelessness contributed to your injury. In some instances, however, you may be able to sue a third party for your pain and suffering. For example, if you are injured while working on a ship or pier, you may be able to bring a civil suit for damages against the owner of the vessel or pier.

If you believe that you may have a claim against a third party, you should contact a lawyer for advice on how to proceed.

The exception to the general rule prohibiting a "third party" lawsuit against your employer arises when your employer is also the owner and/or operator of the vessel aboard which you are injured. In such instance you may bring a third party action against your employer—but only with respect to acts of negligence in its capacity as owner or operator of the vessel.

II. The Americans with Disabilities Act of 1990

The purpose of Title 1 of the Americans with Disabilities Act of 1990 ("ADA") is to prohibit employers from discriminating against qualified individuals because of a disability in all aspects of employment. As discussed in the previous section, the purpose of workers' compensation laws is to provide a system for securing prompt and fair settlement of the employees' claims against employers for occupational injuries and illnesses. The object of these two sets of laws is not in conflict, and in some instances, simultaneous application of the laws has created questions for employers and individuals with disabilities. In this section, we will provide you guidance concerning the following issues:

Whether a person with an occupational injury has a disability as defined by the ADA;

The type of disability-related questions employers can ask and when employers can require medical examinations relating to occupational injuries and workers' compensation claims;

Reasonable accommodations under the law for persons with disability-related occupational injuries;

Light duty assignments—Are employers obligated to provide them;

And how the exclusive remedy provisions in workers' compensation laws are affected by the ADA.

Occupational Injuries and the ADA

The ADA defines "disability" as: (1) a physical or mental impairment that substantially limits a major life activity, (2) a record of such impairment, or (3) being regarded as having such an impairment. Not every employee with and occupational injury has a disability within the meaning of the ADA. For example, impairments resulting from occupational injury may not be severe enough to substantially limit a major life activity, or they may be only temporary, nonchronic, or have little or no long-term impact.

Therefore, even though an individual sustains a work related injury, files a workers' compensation claim and receives benefits, he or she does not necessarily have a disability under the ADA. A person has a disability under the "record of" portion of the ADA definition only if that worker has a history of, (or has been misclassified as having), a mental or physical impairment that substantially limits one or more major life activities.

A person with an occupational injury has a disability under the "regarded as" portion of the ADA definition if: (1) the worker has an impairment that does not substantially limit a major life activity but is treated by an employer as if it were substantially limiting; (2) if the worker has an impairment that substantially limits a major life activity because of the attitude of others towards the impairment; or

(3) has no impairment but is treated as having a substantially limiting impairment. For example:

An employee has an occupational injury that has resulted in a temporary back disability that does not substantially limit a major life activity, however, the employer considers the individual as being unable to lift more than a few pounds and refuses to return the worker to his former job. Since the employer regards the worker as having an impairment substantially limiting the major life activity of lifting, that employee is considered to have a disability as defined by the ADA.

Employers' Rights to Inquire About Workers' Compensation Claims or Occupational Injuries

Employers may ask questions about an applicant's prior workers' compensation claims or occupational injuries after they have made a conditional offer of employment but before employment has begun, as long as they ask the same questions of all entering employees in the same job categories. An employer may require a medical examination to obtain information about the existence or the nature of an applicant's prior occupational injuries, after it has made a conditional offer of employment, but before employment has begun, once again as long as it requires all entering employees in the same job category to have a medical examination.

Before a conditional offer of employment is made, an employer may not obtain from third parties, insurance

carriers, etc., any information that it could not lawfully obtain directly from the applicant.

Employers may ask disability-related questions or require medical examination of employees both at the time the employee experiences an occupational injury or when the employee seeks to return to work following such an injury. However the questions must not exceed the scope of the specific occupational injury and its effect on the employee's ability, with or without reasonable accommodation, to perform the essential job functions or to work without a direct threat. Employers may also ask disability related questions or require a medical examination of an employee with an occupational injury in order to ascertain the extent of workers' compensation liability. Once again, however, questions and examinations must be consistent with the state laws' intended purpose of determining an employee's eligibility for workers' compensation benefits. Excessive questioning or imposition of medical examinations may constitute disability-based harassment, which is prohibited by the ADA.

All medical information obtained regarding an applicant's or employee's occupational injury or workers' compensation claims must be held in the strictest of confidence, and may only be disclosed for limited job related and/or bona fide insurance purposes.

Employee's Right to Return to Work

An employer may not prevent an employee with a disability-related occupational injury who can perform the es-

sential functions of his job from returning to employment because he or she is unable to return to "full duty". Even if an employee has been designated under the workers' compensation law as suffering from a "permanent" or "total" disability, an employee still may be able to return to work. Workers' compensation laws are different in purpose from the ADA and may utilize different standards for evaluating whether an individual has a "disability" or whether he is capable of working. For example, under a workers' compensation statute, a person who loses vision in both eyes, or who has lost the use of both arms or both legs may have a "total permanent disability," although he may be able to work.

The ADA requires that an employer make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship. The ADA does not require an employer to provide a reasonable accommodation for an employee with an occupational injury who does not have a disability as defined by the ADA.

An individual with a disability-related occupational injury that qualifies under the ADA is entitled to return to his or her same position unless the employer demonstrates that holding open the position would pose an undue hardship. However if an employee can no longer perform the essential functions of his or her position, with or without a reasonable accommodation, the employer need not offer the individual his or her former job, but can instead offer an equivalent

vacant position in terms of pay, status, etc., or if no vacancy exists can offer a lower graded position for which the employee is qualified absent undue hardship to the employer's business. If, however, there is no vacancy, the ADA does not require an employer to create a new position or to bump another employee from his or her job in order to reassign an employee who can no longer perform the essential functions of his or her original position, with or without a reasonable accommodation.

Light Duty

The term "light duty" has a number of different meanings in the employment setting. Generally, "light duty" refers to temporary or permanent work that is physically or mentally less demanding than normal job duties. Some employers use the term "light duty" to mean simply excusing an employee from performing those job functions that he is unable to perform because of an impairment. Light duty may also consist of particular positions with duties that are less physically and mentally demanding created specifically for the purpose of providing alternative work for employees who are unable to perform some or all of their normal duties.

The ADA neither prohibits nor requires employers to create light duty positions for disabled workers or employees injured on the job. However, the ADA does require the employer to make a reasonable accommodation which would enable an employee to work, if the employee to work, of the employee has a disability as defined by the ADA. Therefore, if an employer creates light duty positions for employees

with occupational injuries, he may also be required to provide similar light duty positions for employees with non-occupational disabilities. Whether or not this is required will depend upon the specific facts of each case. However, whether or not it offers light duty, an employer must provide other forms of reasonable accommodation to disabled employees required under the ADA. For example, an employer may restructure positions by redistributing marginal functions which an individual cannot perform because of a disability, provide modified scheduling, or reassign an employee with a disability to an equivalent existing vacancy for which he or she is qualified.

III. The Family and Medical Leave Act

The Family and Medical Leave Act of 1993 ("FMLA") generally requires employers to grant eligible employees up to 12 weeks of unpaid leave in any year for any of the following reasons:

The birth of the worker's child;

Initial placement of a child with the worker for adoption or foster care; including required court appearances, counseling sessions, etc.;

To care for the worker's immediate family member (spouse, child, or parent) who has a serious health condition;

Or to care for the employee's own health condition.

Definition of Serious Health Condition

For FMLA purposes, a "serious health condition" is an illness, condition, or impairment that involves:

Any period of incapacity or treatment in connection with in-patient care;

Any period of incapacity requiring absence from work for more than three days and involving continuing treatment;

Continuing treatment for a chronic or long-term condition or for prenatal care.

An eligible employee under the FMLA is one who:

Works for an employer who employs fifty or more workers;

Has been employed by that employer for at least twelve months; ***AND***

Has worked a minimum of 1,250 hours for that employer during the 12 months immediately preceding the leave.

Intermittent Leave and
Reduced Leave Under The FMLA

Under some circumstances, employees may be permitted to take FMLA leave intermittently. This may allow an employee to take leave in several blocks of time rather than in one continuous period of time, or to work under a reduced work schedule by reducing the number of hours they work per day or week.

Substitution of Paid Leave

Employees are entitled to substitute paid vacation or personal leave time for FMLA leave:

1) for the birth of a child or for the care of that child;
2) for placement of a child for adoption of foster care;
3) to care for an immediate family member with a serious health condition.

Employees are entitled to substitute vacation, personal time, and/or medical or sick days for FMLA leave for the following reasons:

1) to take care of the employee's own serious health condition;
2) to take care of an immediate family member with a serious health condition, if the employer's policy permits the use of sick time for this purpose.

If an employee takes paid leave of absence, an employer may designate that leave as FMLA leave and count it against the employee's twelve week FMLA entitlement if the paid leave is taken for an FMLA qualifying reason. The employer must notify the employee that it is designating the leave as FMLA leave within two business days after becoming aware that the leave is being taken for an FMLA qualifying reason.

Unions generally maintain that employers may not require employees to use up or substitute paid vacation and personal days as part of their FMLA leave entitlement. According to such Unions, personal and vacation leave are contractual benefits, and the FMLA does not permit an

employer to reduce preexisting contractual benefits. Therefore, employees are entitled to these paid days plus twelve weeks of unpaid leave. The FMLA also prohibits an employer from requiring an employee on workers' compensation leave to use up his or her paid leave.

Maintenance of Benefits During FMLA Leave

All covered employers are generally required to maintain health coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken, and on the same terms that would have existed if the employee had continued to work.

Return from FMLA Leave

In general, an employee returning from FMLA leave must be restored to his or her original job, or to an "equivalent" job with equivalent pay, benefits, and other employment terms and conditions.

Actions Prohibited by the FMLA

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by the FMLA. It is unlawful for an employer to discharge or discriminate against any individual for opposing any practice or because of any involvement in any proceeding relating to FMLA.

IV. Conclusion

This booklet was designed to provide you with a brief summary of your rights and obligations under the Longshoreman and Harbor Workers' Compensation Act, the ADA and FMLA. These laws, and the interaction between them, are complicated. You may require expert assistance and/or advice in the event of a work disabling injury or disability. If you are injured or become ill, and need advice, contact your Union, the Department of Labor, or an attorney.

V. Addendum
U.S. DEPARTMENT OF LABOR
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National Office
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Tirzah Leiman-Carbia, Branch Chief of Financial Management, Insurance and Assessment
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