

In 2009, the Longshore and Harbor Workers' Compensation Act (LHWCA) was amended by the American Recovery and Reinvestment Act of 2009. These amendments excluded certain additional recreational-vessel workers from the LHWCA's definition of "employee" as it relates to the repair and dismantling of recreational vessels. In response to this new law, the Department of Labor revised its regulations. These regulations and additional guidance provided in the [Federal Register](#) are of interest to any employer or insurer of an employer who employs workers who build, repair or dismantle recreational vessels. See *Regulations Implementing the Longshore and Harbor Workers' Compensation Act: Recreational Vessels*, 76 FR 82117-29 (Dec. 30, 2012) (Final Rule), and 75 FR 5078-30 (Apr. 17, 2010) (Proposed Regulation). DOL also produced a [Q&A document](#) on the new rule.

Previous Regulation	New Final Regulation <small>Effective Date(s): January 30, 2012</small>	Commentary
<p><b>§ 701.301(a) Definitions and use of terms.</b></p> <p>(12)(i) <i>Employee</i> means any person engaged in maritime employment, including:</p> <p>(A) Any longshore worker or other person engaged in longshoring operations;</p> <p>(B) Any harbor worker, including a ship repairer, shipbuilder and shipbreaker; and</p> <p>(C) Any other individual to whom an injury may be the basis for a compensation claim under the LHWCA as amended, or any of its extensions;</p> <p>(ii) The term does not include:</p>	<p><b>Add § 701.302 Who is an employee?</b></p> <p>(a) <i>Employee</i> means any person engaged in maritime employment, including:</p> <p>(1) Any longshore worker or other person engaged in longshoring operations;</p> <p>(2) Any harbor worker, including a ship repairer, shipbuilder and shipbreaker; and</p> <p>(3) Any other individual to whom an injury may be the basis for a compensation claim under the LHWCA as amended, or any of its extensions;</p> <p><b>(b) The term does <i>not</i> include:</b></p>	<p>The new final regulation changed the location and the numbering of the text. Only the last paragraph referencing workers building recreational vessels has changed.</p> <p>LHWCA does <b>not apply</b> to the following workers:</p> <ul style="list-style-type: none"> <li>• Individuals employed to <b>build</b> any recreational vessel <b>under sixty-five feet in length</b>, or</li> <li>• individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel.</li> </ul> <p><b>Note: the special rules set forth at §§701.501 through 701.505 also apply (see more below).</b></p>

<p>(A) A master or member of a crew of any vessel; or</p> <p>(B) Any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.</p> <p>(iii) Nor does this term include the following individuals (whether or not the injury occurs over the navigable waters of the United States) where it is first determined that they are covered by a state workers' compensation act:</p> <p>(A) Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work (but not longshore cargo checkers and cargo clerks);</p> <p>(B) Individuals employed by a club (meaning a social or fraternal organization whether profit or nonprofit), camp, recreational operation (meaning any recreational activity, including but not limited to scuba diving, commercial rafting, canoeing or boating activities operated for pleasure of owners, members of a club or organization, or renting, leasing or chartering equipment to another for the latter's pleasure), restaurant, museum or retail outlet;</p> <p>(C) Individuals employed by a marina, provided they are not engaged in its construction, replacement or expansion, except for routine maintenance such as cleaning, painting, trash removal, housekeeping and small repairs;</p> <p>(D) Employees of suppliers, vendors and transporters temporarily doing business on the premises of a</p>	<p>(1) A master or member of a crew of any vessel; or</p> <p>(2) Any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.</p> <p>(c) Nor does this term include the following individuals (whether or not the injury occurs over the navigable waters of the United States) where it is first determined that they are covered by a state workers' compensation act:</p> <p>(1) Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work (but not longshore cargo checkers and cargo clerks);</p> <p>(2) Individuals employed by a club (meaning a social or fraternal organization whether profit or nonprofit), camp, recreational operation (meaning any recreational activity, including but not limited to scuba diving, commercial rafting, canoeing or boating activities operated for pleasure of owners, members of a club or organization, or renting, leasing or chartering equipment to another for the latter's pleasure), restaurant, museum or retail outlet;</p> <p>(3) Individuals employed by a marina, provided they are not engaged in its construction, replacement or expansion, except for routine maintenance such as cleaning, painting, trash removal, housekeeping and small repairs;</p> <p>(4) Employees of suppliers, vendors and transporters temporarily doing business on the premises of a</p>	
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<p>covered employer, provided they are not performing work normally performed by employees of the covered employer;</p> <p>(E) Aquaculture workers, meaning those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species; or</p> <p>(F) Individuals engaged in the building, repairing or dismantling of recreational vessels under 65 feet in length. For purposes of this subparagraph <i>recreational vessel</i> means a vessel manufactured or operated primarily for pleasure, or rented, leased or chartered by another for the latter's pleasure, and <i>length</i> means a straight line measurement of the overall length from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The measurement shall be from end to end over the deck, excluding sheer.</p>	<p>covered employer, provided they are not performing work normally performed by employees of the covered employer;</p> <p>(5) Aquaculture workers, meaning those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species; or</p> <p>(6) Individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel. For purposes of this paragraph, the special rules set forth at §§701.501 through 701.505 apply.</p>	
<p>Previously defined in 701.30(a) as:</p> <p>...<i>recreational vessel</i> means a vessel manufactured or operated primarily for pleasure, or rented, leased or chartered by another for the latter's pleasure, and <i>length</i> means a straight line measurement of the overall length from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The measurement shall be from end to end over the deck, excluding sheer.</p>	<p><b>Special Rules for the Recreational Vessel Exclusion From the Definition of “Employee”</b></p> <p><b>§ 701.501 What is a recreational vessel?</b></p> <p><b>(a) Recreational vessel means</b> a vessel—</p> <p>(1) Being manufactured or operated primarily for pleasure; or</p> <p>(2) Leased, rented, or chartered to another for the</p>	<p>The final rule provides that a vessel being manufactured or built (including warranty service) is a recreational vessel when intended, based on design and construction, to be for ultimate recreational use.</p> <p>The final rule also placed the burden on the manufacturer or builder to prove that the vessel or vessels under construction are built in accordance with applicable recreational-vessel standards.</p> <p>Because recreational-vessel manufacturing facilities</p>

	<p>latter's pleasure.</p> <p>(b) In applying the definition in paragraph (a) of this section, the following rules apply:</p> <p>(1) A vessel being <b>manufactured or built</b>, or being repaired under warranty by its manufacturer or builder, is a <i>recreational vessel</i> if the vessel appears intended, based on its design and construction, to be for ultimate recreational uses. The manufacturer or builder bears the burden of establishing that a vessel is recreational under this standard.</p> <p>(2) A vessel being <i>repaired, dismantled for repair, or dismantled at the end of its life</i> is not a <i>recreational vessel</i> if the vessel had been operating, around the time of its repair or dismantling, in one or more of the following categories on more than an infrequent basis—</p> <p>(A) “Passenger vessel” as defined by 46 U.S.C. 2101(22);</p> <p>(B) “Small passenger vessel” as defined by 46 U.S.C. 2101(35);</p> <p>(C) “Uninspected passenger vessel” as defined by 46 U.S.C. 2101(42);</p> <p>(D) Vessel routinely engaged in “commercial service” as defined by 46 U.S.C. 2101(5); or</p> <p>(E) Vessel that routinely carries “passengers for hire”</p>	<p>are typically landlocked, the Department does not expect this change in the final rule to have a significant impact on the number of employees covered by the LHWCA (as they are already excluded). Manufacturers received this benefit because it is impracticable for them to know the ultimate use of a vessel.</p> <p>For repair, the employer must look to the use of the vessel at the time of the repair and references existing USCG categories including passenger, small passenger, and uninspected passenger vessels. However, the Department of Labor did provide that occasional non-recreational use does not alter the vessel’s core recreational purpose and should not take a vessel outside of the “recreational vessel” definition.</p> <p><b>Public Vessels are excluded.</b> The rule includes within the definition of recreational vessels non-military vessels that are recreational by design and owned or chartered by federal, state, or municipal governments. The Department of Labor specifically agreed with industry comments that servicing publicly owned or bareboat-chartered vessels that would otherwise be considered recreational generally should not be considered commercial work subject to LHWCA coverage.</p>
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	<p>as defined by 46 U.S.C. 2101(21a).</p> <p>(3) Notwithstanding paragraph (b)(2) of this section, a vessel will be deemed recreational if it is a <b>public vessel, i.e.</b>, a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, at the time of repair, dismantling for repair, or dismantling, provided that such vessel shares elements of design and construction with traditional recreational vessels and is not normally engaged in a military, commercial or traditionally commercial undertaking.</p> <p>(c) All subsequent amendments to the statutes referenced in paragraph (b)(2) of this section and the regulations implementing those provisions in Title 46 of the Code of Federal Regulations will apply when determining whether a vessel is recreational.</p>	
	<p><b>New § 701.502 What types of work may exclude a recreational-vessel worker from the definition of “employee”?</b></p> <p>(a) An individual who works on recreational vessels may be excluded from the definition of “employee” when:</p> <p>(1) The individual's <b>date of injury is before February 17, 2009</b>, the injury is covered under a State workers' compensation law, and the individual is employed to:</p> <p>(i) Build any recreational vessel under sixty-five feet</p>	<p>This is an important section to consult when determining the applicable rules for an employee who was injured prior to Feb. 17, 2009 or after Feb. 17, 2009.</p> <p>This section also provides new specific guidance on how to measure the length a vessel to determine if the LHWCA applies. Now Bow sprits, bumpkins, rudders, outboard motor brackets, handles, and other similar fittings, attachments, and extensions are not included in the measurement.</p> <p>This section also defines repair and dismantle.</p>

	<p>in length; or</p> <p>(ii) Repair any recreational vessel under sixty-five feet in length; or</p> <p>(iii) Dismantle any recreational vessel under sixty-five feet in length.</p> <p>(2) The individual's <b>date of injury is on or after February 17, 2009</b>, the injury is covered under a State workers' compensation law, and the individual is employed to:</p> <p>(i) Build any recreational vessel under sixty-five feet in length; or</p> <p>(ii) Repair any recreational vessel; or</p> <p>(iii) Dismantle any recreational vessel to repair it.</p> <p><b>(b) In applying paragraph (a) of this section, the following principles apply:</b></p> <p>(1) “<b>Length</b>” means a straight line measurement of the overall length from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The measurement must be from end to end over the deck, excluding sheer. Bow sprits, bumpkins, rudders, outboard motor brackets, handles, and other similar fittings, attachments, and extensions are not included in the measurement.</p> <p>(2) “<b>Repair</b>” means any repair of a vessel including</p>	
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	<p>installations, painting and maintenance work. Repair does not include alterations or conversions that render the vessel a non-recreational vessel under §701.501. For example, a worker who installs equipment on a private yacht to convert it to a passenger-carrying whale-watching vessel is not employed to “repair” a recreational vessel. Repair also does not include alterations or conversions that render a non-recreational vessel recreational under §701.501.</p> <p>(3) “<b>Dismantle</b>” means dismantling any part of a vessel to complete a repair but does not include dismantling any part of a vessel to complete alterations or conversions that render the vessel a non-recreational vessel under §701.501, or render the vessel recreational under §701.501, or, if the date of injury is on or after February 17, 2009, to scrap or dispose of the vessel at the end of the vessel's life.</p>	
	<p><b>New§ 701.503 Did the American Recovery and Reinvestment Act of 2009 amend the recreational vessel exclusion?</b></p> <p>Yes. The amended exclusion was effective February 17, 2009, the effective date of the American Recovery and Reinvestment Act of 2009.</p>	<p>Effective Date of new amendments.</p>
	<p><b>New § 701.504 When does the recreational vessel exclusion in the American Recovery and Reinvestment Act of 2009 apply?</b> Effective Date(s): January 30, 2012</p> <p>(a) <i>Date of injury</i>. Whether the amended version applies depends on the date of the injury for which</p>	<p>Provides specific guidance on how to determine which rule applies depending on the type of injury. It is also recommend that the reader look at the discussion in the Federal Register 76 FR 82117-29 (Dec. 30, 2011) when applying this rule to a specific case.</p>

	<p>compensation is claimed. The following rules apply to determining the date of injury:</p> <p>(1) <i>Traumatic injury.</i> If the individual claims compensation for a traumatic injury, the date of injury is the date the employee suffered harm. For example, if the individual injures an arm or leg in the course of his or her employment, the date of injury is the date on which the individual was hurt.</p> <p>(2) <i>Occupational disease or infection.</i> Occupational illnesses and infections generally involve delayed onset of symptoms following exposure to a harmful workplace substance or condition. If the individual claims compensation for an occupational illness or infection, the date of injury is the date the individual was exposed to the substance or condition.</p> <p>(3) <i>Hearing loss.</i> If the individual claims compensation for hearing loss, the date of injury is the date the individual was exposed to harmful workplace noise or other stimulus that is capable of causing hearing loss.</p> <p>(4) <i>Death-benefit claims.</i> If the individual claims compensation for an employee's death, the date of injury is the date of the workplace event or incident that caused, hastened, or contributed to the death.</p> <p>(5) <i>Cumulative trauma.</i> If the individual claims compensation for cumulative trauma, in which multiple traumas contribute to an overall medical condition, such as a neck condition resulting from repetitive motion, the date of injury is any date on which a workplace trauma worsened the individual's</p>	
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	<p>condition. A workplace event will not be deemed a contributing trauma if a corresponding worsening of the condition is due solely to its natural progression, rather than the workplace event.</p> <p>(b) If the date of injury is before February 17, 2009, the individual's entitlement is governed by section 2(3)(F) as it existed prior to the 2009 amendment.</p> <p>(c) If the date of injury is on or after February 17, 2009, the individual's entitlement is governed by the 2009 amendment to section 2(3)(F).</p>	
	<p><b>New § 701.505 May an employer stop paying benefits awarded before February 17, 2009 if the employee would now fall within the exclusion?</b></p> <p>No. If an individual was awarded compensation for an injury occurring before February 17, 2009, the employer must still pay all benefits awarded, including disability compensation and medical benefits, even if the employee would be excluded from coverage under the amended exclusion.</p>	<p>This section determines how to treat awards of compensation occurring prior to Feb. 17, 2009.</p>

**A special note for Landlocked Facilities (not adjacent to navigable waters) and Marinas.**

The Department of Labor clarified when LHWCA should be apply. There are two requirements to consider: (1) the site of the facility (situs test) and (2) the status of the worker (status test). Both tests must be met before LHWCA applies to a facility and its workers. 33 U.S.C. 903(a) and *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 256—265 (1977).

This rule has changed the “status test” for recreational boat facility workers. However, DOL emphasized that **many facilities are already exempted from LHWCA because of where they are located** determined by the Act’s “situs test.”

**Thus, workers at completely landlocked recreational vessel manufacturing facilities, repair shops, boat dealers and the like (i.e., facilities that do not meet the “situs test”) are not covered by the LHWCA, regardless of the section 2(3)(F) exclusion for recreational-vessel workers.** See 76 FR 82118; 33 U.S.C. 903(a); *Caputo*, 432 U.S. at 279.”

The Department of Labor also noted in the *Federal Register* that many marina employees are covered by their own exclusion. The agency noted that it is a fact-based inquiry but may provide relief for a number of marina operations.

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