



UNITED STATES DEPARTMENT OF LABOR

Defense Base Act (DBA) Waivers

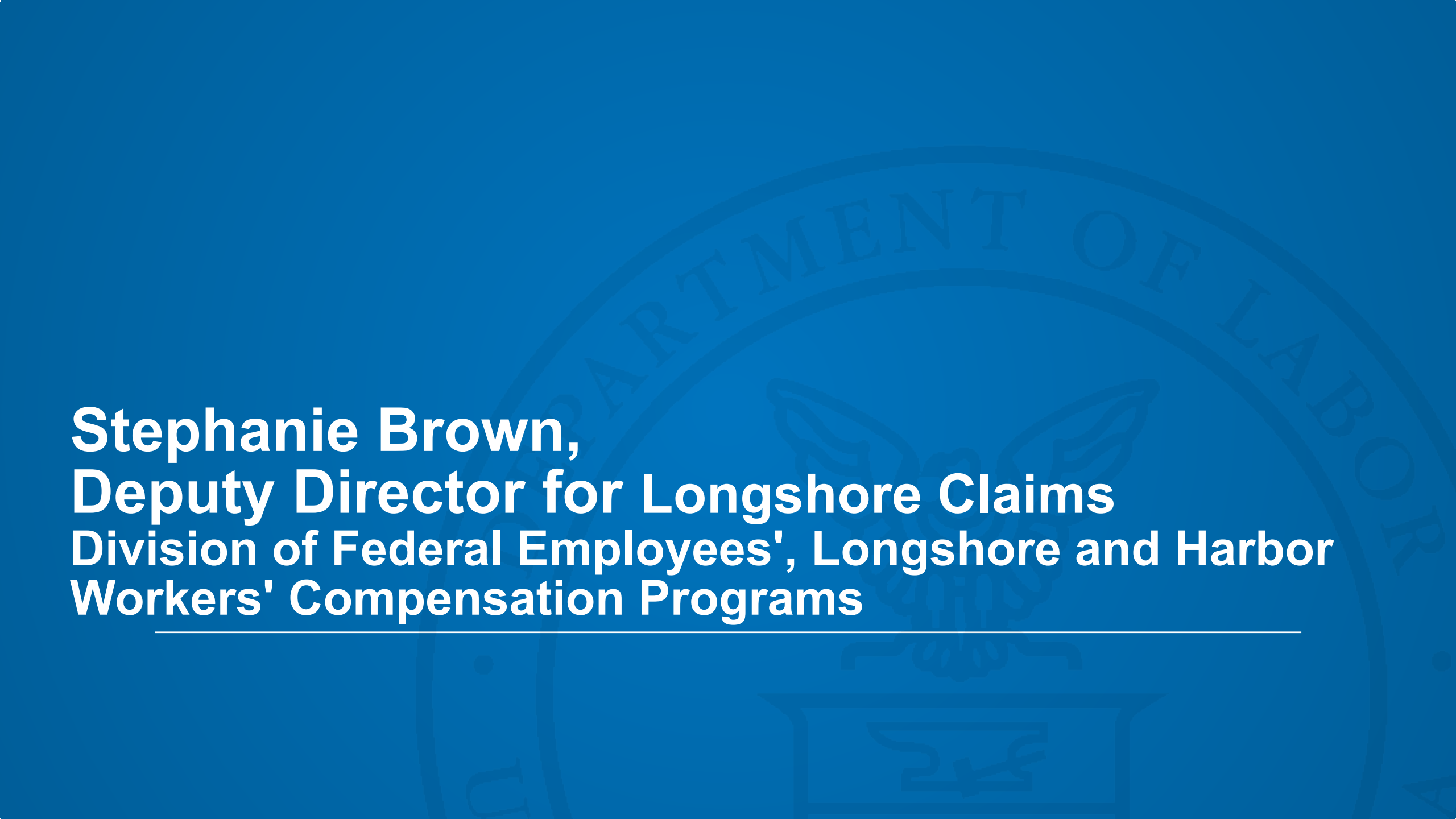
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Defense Base Act Background



Defense Base Act History & Coverage

- [The Defense Base Act](#)
 - Extension of the LHWCA, passed in 1941 to cover civilian workers on government contracts, both U.S. or foreign nationals.
 - December 1942 amendment added a provision in the DBA allowing for a waiver.
- The DBA covers all employees, regardless of nationality, engaged in employment activities:
 - For private employers on U.S. military bases or on any lands used by the U.S. for military purposes outside of the U.S., including U.S. Territories and possessions;
 - On public work contracts with any U.S. government agency to be performed outside the U.S.;
 - On contracts approved and funded by the U.S. under the Foreign Assistance Act; and
 - For American employers providing welfare or similar services outside of the U.S. for the benefit of the Armed Forces, e.g. the USO.



DBA Insurance Requirements

- By law and the Federal Acquisitions Regulations (FAR), 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.”

- DBA Sections 1(a)(4) and (5), 42 U.S.C. §§ 1651(a)(4) - (5). These requirements are also stated in the FAR at 48 C.F.R. §§ 28.309, 52.228-3.



DBA Insurance Requirements, cont.

Who is responsible for insurance?

- Employers
 - Subcontractors
 - Subordinate Contractors

The responsibility remains with the employer regardless of whether a broker or agent is used.

Who is NOT responsible for insurance?

- The broker or agent
- The contracting officer
- The contracting agency
- The Department of Labor

Premiums are not set by, nor regulated by, the Department of Labor.



DBA Insurance Requirements, cont.

- If there is any doubt as to whether any of an employer's employees are covered by the DBA, the employer/prospectively contracted or actively contracted entity may wish to purchase insurance or apply for self-insurance authorization for its own protection.
 - If an employer fails to secure the payment of benefits as required by LHWCA sections 4(a) and 32, 33 U.S.C. §§ 904(a), 932, the employer may be exposed to civil suit under LHWCA section 5(a), 33 U.S.C. § 905(a) and is potentially subject to the imposition of penalties under LHWCA section 38, 33 U.S.C. § 938.
 - If a corporation fails to secure the payment of compensation, under the LHWCA, 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 with respect to any injury or death which may occur to any of its employees. LHWCA section 38, 33 U.S.C. 938.
 - Insurance brokers may face E & O claims exposure if an employer who has DBA-covered employees is not advised to procure appropriate insurance.
- DOL's Office of Workers' Compensation does not determine whether an employee is entitled to compensation benefits – any employee may claim benefits and independent administrative adjudicators determine entitlement in formal proceedings at which legal representation is advisable.
- At the very least, an insured employer could be forced to defend against a DBA claim from an injured worker before OALJ, the BRB, and the courts.



Defense Base Act Waivers



DBA Waivers – Background & Policies

- Under the DBA, DOL has discretion to waive the application of the DBA “with respect to any contract, subcontract, or subordinate contract, work location under such contracts or classification of employees,” upon the request of an agency head. DBA section 1(e), 42 U.S.C. § 1651(e).
- The DOL is authorized to grant three different kinds of DBA waivers:
 - Contract Waivers
 - Geographic Waivers – when granted for a particular location, the geographic waiver applies for all U.S. agencies and contracts for all work performed in that location, not just the requesting agency and its contractors.
 - Waivers for a particular class of employees
- Once DOL has granted a waiver, employees who fall within the scope of the waiver are not covered by the DBA.
 - Thus, their employer is not required to pay those particular employees benefits under the DBA and the employer is not required to secure payment of those benefits by purchasing commercial insurance or obtaining authorization from DOL to self-insure.
- All waivers are granted for a finite period of time and terms of the waiver will include the date upon which the waiver automatically expires.



DBA Waivers – Background & Policies, cont.

- **However, it is crucial for employers and contracting agencies to understand that if the same employer also has DBA-covered employees who fall outside the scope of the waiver, the employer would still be required to pay and secure benefits for those DBA-covered employees. See DBA section 1(a)(4)-(5); 42 U.S.C. § 1651(a)(4)-(5); LHWCA section 4(a), 932, 33 U.S.C. 904(a), 932.**
- **Further, under longstanding DOL policy, waivers only exclude foreign workers hired outside of the United States from DBA coverage. Waivers do not exclude citizens or legal residents of the United States or employees hired in the United States from DBA coverage.**
- **Thus, if an employer has any United States citizens or residents working overseas on a contract covered by the DBA, that employer must secure the payment of compensation under the DBA notwithstanding the fact that DOL has waived the application of the DBA for foreign workers.**



DBA Waiver Requests & Renewals

- The request for waiver must be made by the government agency to the Department of Labor (DOL), OWCP.
- Waivers are granted by DOL's Director, DFELHWC.

U.S. DEPARTMENT OF LABOR		OFFICE OF WORKER'S COMPENSATION PROGRAMS	
REQUEST FOR WAIVER – DEFENSE BASE ACT			
INSTRUCTIONS: Complete Sections A, B, and C, and send original to the Director, Office of Workers' Compensation Programs, Division of Longshore and Harbor Workers' Compensation, U.S. Department of Labor, Washington DC 20210, when a U.S. Department or Agency recommends that a waiver be granted under Section 1(e) of the Defense Base Act (42 USC 1651 (e)). Please make certain all items in the first three Sections are answered in full. You may also email your application to the Director.			
SECTION A CONTRACT			
1. NAME OF CONTRACTOR			
2. BUSINESS MAILING ADDRESS OF CONTRACTOR			
3. CONTRACT NUMBER		4. DATE OF AWARD	



DBA Waiver Request Package

- The request for waiver can only be made by the head of a department or agency of the United States government (or an official duly delegated or authorized by the head of an agency) by submitting a request for DBA waiver package.
- The package may be sent by email to DLHWC-Public@dol.gov. The package may also be mailed to:

Director, OWCP
U.S. Department of Labor
Division of Longshore and Harbor Workers' Compensation
200 Constitution Avenue NW, Rm C-3524
Washington, DC 20210



DBA Waiver Request Package, cont.

- The DBA waiver request package consists of:
 - The Form BEC 565, signed by the head of a department or other agency of the United States. [Form BEC 565](#) is available online in form-fillable PDF format.
 - A comparison of the workers' compensation benefits available in the relevant country to the benefits under the DBA. A DBA Waiver Comparison Chart may be used for this requirement, filled in completely with the relevant terms of the local workers' compensation provisions. Include specific references to the provisions of the local law. [The Comparison Chart](#) is available online in the format of an Excel spreadsheet.
 - English translations of the local workers' compensation provisions or other relevant law or policy.
 - Website addresses if the information is obtained via the internet.
 - A memo or letter explaining any differences between DBA and local workers' compensation law may also be submitted, along with any other information the agency head deems relevant to the waiver request.
- Please note that DOL may also consider other pertinent factors not listed on the comparison chart and that the items on that chart are not necessarily an exhaustive list. DOL may ask follow-up questions for more information and will grant or deny the waiver after fully evaluating all the information.



DBA Waiver Request Package, cont.

- Evaluation of Waiver Request – The Director, DFELHWC or their designee will:
 1. Make sure all the required materials have been submitted;
 2. Acknowledge receipt to the requestor, noting any missing materials;
 3. Evaluate the materials for the required information to support a waiver request by checking to see that the request meets the following criteria:
 4. Send any follow up questions to the agency making the request, if necessary.



DBA Waiver Request Package, cont.

- Some examples of what DOL will be looking for in its evaluation of the Comparison Chart responses are:
 - that the local compensation system in place covers the workers for whom the DBA will not apply if the waiver is granted, including citizens of the local country and third- country nationals;
 - that the local compensation system is not based on fault;
 - that the local compensation system does not exclude coverage for war risks or chemical, biological, radiological, or nuclear exposures;
 - that the local compensation system has no limits regarding the duration for which benefits are payable except as in the DBA for temporary partial disability benefits and scheduled permanent partial disability benefits;
 - that the local compensation system has no aggregate maximum dollar limits on benefits;
 - that the worker does not lose their benefits if they move out of the country following their injury or illness;
 - that eligibility for benefits and benefit amounts are equitable with respect to gender; and
 - that the injured worker does not have to pay or contribute anything into the compensation system.
- This is not an exhaustive list – just a few highlighted areas for consideration.



Receiving a Decision

- Waiver is granted:
 - You will receive notification from the DOL that the waiver is granted, and the website will be updated accordingly.
 - DBA waivers are typically granted for a period of five years from the date the waiver is signed by the Director, DFELHWC. The waiver automatically expires on the listed expiration date, absent a request from the department or agency head or appropriate delegate for the waiver to be renewed.
- Waiver is denied:
 - You will receive an email explaining the deficiencies in the request and advising that the waiver will not be granted.
 - Further information can be submitted with a future waiver request.
 - There is no minimum amount of time that a requester must wait before submitting a new waiver request.



Agency Responsibilities for DOL Waivers

1. United States Department or Agency Heads:

- Submit DBA waiver request packages to DOL including all required information
- Monitor the DOL website for current active waivers and waiver expiration dates
- Submit requests for renewal of existing waivers for evaluation approximately three months before the expiration date



Agency Responsibilities for DOL Waivers, cont.

2. Contracting Agencies:

- Ensure all contract terms and other instruments comply with the DBA where applicable. This includes identifying the need for modification or amendment to outstanding contracts if a DBA waiver had been in effect when a contract began but expired before the contract was completed.
- Include DBA insurance requirements for any procurement of services to be performed by contractors outside the United States (but not for any contract to exclusively furnish materials or supplies) by inserting FAR clauses 28.305, 28.309(a) and 52.228-3. Keep in mind that some funding instruments other than contracts may also result in employees being subject to coverage by the DBA
- Upon the issuance of a DBA waiver, if all employees have been waived, then those FAR clauses should be replaced by FAR clauses 28.309(b) and 52.228-4. If any employees remain covered by the DBA, such as US citizens and residents, FAR clauses 28.309(a) and 52.228-3 should remain in the contract
- Also, when relying on a DBA waiver, require that the employer maintain adequate local workers compensation for all waived employees with no exclusions (such as war hazards)
- Monitor the DOL website for current active waivers and waiver expiration dates
- When a DBA waiver expires, all contracts and other instruments subject to the DBA must be modified or otherwise revised to contain language reflecting the requirement that the employer secure the payment of compensation under the DBA
- Respond to questions about the application of particular waivers to specific contracts



Agency Responsibilities for DOL Waivers, cont.

3. DOL:

- Respond to waiver requests in a timely fashion and request further information or clarification as needed
- Grant or deny the waiver request after fully evaluating all the information
- Post new and active waivers online
- Post notice of waiver expiration dates online



Recommendations for Insurance Companies, Employers, and Brokers Regarding DBA Waivers

1. Insurance Companies are encouraged to:

- Monitor the DOL website for current active waivers and waiver expiration dates
- Direct questions regarding the application of particular waivers to specific DBA claims or particular contracts to the contracting agency



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Recommendations for Insurance Companies, Employers, and Brokers Regarding DBA Waivers, cont.

2. Brokers are encouraged to:

- Monitor the DOL website for current active waivers and waiver expiration dates
- Direct questions regarding the application of particular waivers to specific contracts to the contracting agency
- Understand that brokers may face E & O claims exposure if an employer who has DBA-covered employees is not advised to procure appropriate insurance. For example, if there is doubt as to whether particular employees are covered by the DBA or if the application of the DBA to those employees was waived, a broker may wish to advise the employer to obtain DBA insurance so that it will not have to defend against a DBA claim itself.



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Recommendations for Insurance Companies, Employers, and Brokers Regarding DBA Waivers, cont.

3. Employers who are awarded contracts that fall under the coverage of the DBA are encouraged to:

- Monitor the DOL website for current active waivers and waiver expiration dates
- Direct questions regarding the application of particular waivers to specific employees, claims, or contracts to their insurance brokers or the contracting agency
- Understand that employers may face penalties under LHWCA section 38, 33 U.S.C. § 938, and may be exposed to civil suit under LHWCA section 5(a), 33 U.S.C. § 905(a), if they do not properly secure the payment of compensation as required under LHWCA sections 4(a) and 32, 33 U.S.C. §§ 904(a), 932. For example, if there is doubt as to whether particular employees are covered by the DBA or if they are covered by a DBA waiver, the employer may wish to purchase insurance or apply for authorization to self-insure.



Internet Resources

- Following the conference, this PowerPoint will be posted to [Longshore's home page](#) under the "Program Outreach" section.

Program Outreach

[Subscribe to Email Updates](#)



[2021 Annual Longshore Conference Presentation](#)

[2020 Stakeholder Webinar and Solicitation of Input](#)

[2019 Annual Longshore Conference Presentation](#)

[2018 Annual Longshore Conference Presentation](#)



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Internet Resources cont.

- Much of the preceding information can be found on Longshore's [Defense Base Act web page](#).
- New updates regarding Defense Base Act are now on the internet including:
 - [Industry Notice 187 – Defense Base Act \(DBA\) Waivers](#)
 - [Transmittal No. 22-01](#) Release New Chapter in LHWCA Procedure Manual
 - [Procedure Manual, Chapter 7-0600, DBA Waivers](#)
 - [Current Active Waivers table](#) re-design which allows for sorting by any column and search by keyword



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Questions?

