

FREQUENTLY ASKED QUESTIONS ABOUT FOREIGN VESSEL OPERATIONS IN THE U.S. GULF OF MEXICO

What is the Jones Act?

The Jones Act is one of the U.S. cabotage laws that, among other things, impose certain ownership and build requirements on vessels engaged in the U.S. coastwise trade. The Jones Act applies to the transportation, *in whole or in part*, of “merchandise” from one coastwise point in the United States to another such point. The subsoil and seabed of the Outer Continental Shelf (“OCS”), including anything permanently or temporarily attached to the seabed, for the purpose of exploring, developing or produces resources from the OCS constitute U.S. coastwise “points”. Only a vessel that 1) is owned by a United States citizen, and; 2) was built in the United States, qualifies for a coastwise endorsement.

I have heard that the Jones Act is a “protectionist” statute, why should we protect U.S. vessel owners?

Actually the Jones Act is a national defense statute. Through the Jones Act Congress intended to ensure that the United States has available vessels to meet sealift needs, expert and experienced seafarers to operate U.S. government ships in times of national emergency, and a modern shipyard industrial base that is critical to the Nation's military and economic security. This function of the Jones Act is vitally important as well in the context of offshore oil and gas development on the OCS, given its importance to our Nation's energy security.

While the Jones Act dates from 1920, cabotage laws from which it came were enacted by the first United States Congress in 1789. In fact, the fourth law ever passed by Congress was a predecessor of the Jones Act. Thus, the importance of a vibrant shipping industry was recognized by the first Congress, many of whose members were the framers of our Constitution.

Question: What does the Jones Act prohibit?

Answer: The Jones Act prohibits using a vessel to transport “merchandise”, in whole or in part, from one coastwise point in the United States to another point, unless the vessel has a “coastwise endorsement”.

Question: What is “merchandise”?

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Almost anything is “merchandise,” even “valueless materials” like dredge spoils qualify as merchandise. Thus, drill cuttings, used mud and fluids are “merchandise” for purposes of Jones Act analysis.

Question: Can a vessel that is engaged in purely non-transportation activities carry supplies from a U.S. port to the site of its offshore operations?

No. A vessel involved in “non-transportation” activities, such as installation work, will violate the Jones Act if it carries merchandise, including the equipment it will install, to or from the place of operations on the OCS. There is no Jones Act exception for transportation of merchandise ancillary to a permitted “non-transportation” function.

Question: Can a foreign flag vessel be used for part of a coastwise movement, if a U.S. vessel is used at either or both of the coastwise points?

No. The law prohibits the movement of merchandise, *in whole or in part*, on a vessel that does not have a coastwise trade endorsement. If the movement taken as a whole would be subject to the Jones Act, then each part of the movement must be made with a Jones Act vessel. It is for this reason that the Customs and Border Patrol ruled that a drill ship cannot flow back crude oil into its tanks and move to a second well location.

Question: When does a coastwise point come into existence on the OCS?

As sub sea technology improves, the timing of the creation of a sub sea point has become earlier. Because an installation can be “temporary” in order to create a coastwise point, it is possible that the placement of transponder buoys on the seafloor to mark the location of a future well or other installation constitutes the creation of coastwise point.

Question: What are the consequences of violating the Jones Act?

Answer: The legal consequences of violating the Jones Act are severe. A fine can be imposed equal to the greater of the value of the merchandise transported or the value of the charter or freight paid.

Question: Is a Jones Act qualified vessel required to engage in oil skimming operations?

Answer: Not if the operations are occurring more than three miles from shore.

Question: Are Jones Act “waivers” obtainable?

The only legal way to obtain a Jones Act waiver is if the Secretary of Defense or the Secretary of the Treasury deems the waiver to be necessary “in the interest of the national defense.” There is also a waiver available for oil spill response vessels; however, as noted above, it would only apply to skimming operations inside of the three mile limit.

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Question: Do Jones Act qualified vessels delivering or receiving merchandise or offshore crew to or from a fixed-site rig or platform have to clear customs?

No. Only a foreign flag vessel is required to clear each arrival and departure from a fixed-site rig or platform on the OCS. In addition, as noted, the foreign flag vessel cannot be engaged in coastwise transportation.

Question: Does a Jones Act vessel delivering or receiving merchandise or offshore crew from a foreign flag free-floating vessel or other facility engaged in offshore oil and gas exploration, production or development have to clear customs?

Yes. However, if the free-floating vessel or other facility is U.S. flagged, then there is no need for the Jones Act vessel to clear customs. So, a Jones Act vessel will have to clear customs when it arrives or departs from a foreign flag construction vessel, but will not be required to do so if the construction vessel is a U.S. flag vessel.

Question: Are foreign workers engaged in activities on the U.S. OCS entitled to receive U.S. wage and hour benefits dictated by the Fair Labor Standards Act?

Possibly. U.S. plaintiff lawyers representing foreign offshore workers have been arguing in U.S. court cases that the Fair Labor Standards Act, which requires mandatory U.S. base wages and overtime to be paid, apply in OCS operations. If the foreign flag vessel owner has a U.S. subsidiary that is involved in the OCS operations, these lawyers are arguing that the foreign vessel is deemed to be an “American vessel” for purposes of the FSLA. If the FSLA applies, not only will foreign workers be entitled to higher U.S. wage rates, but they will also be entitled to sue for all past wages not paid to them under the U.S. scale.

Question: Is the charterer of a foreign flag vessel liable to withhold U.S. taxes on the income earned by the foreign vessel in U.S. waters?

Yes. If a foreign flag vessel is used in U.S. waters, and the owner of the vessel does not have a “permanent establishment” in the United States, then the U.S. charterer of the vessel is required to withhold 30% of the charter hire due to the foreign vessel owner and remit that amount to the Internal Revenue Service. If the foreign vessel owner does have a permanent establishment, then it is required to pay U.S. taxes. So, for example, if a U.S. company charters a foreign flag vessel for \$50,000 per day, if the foreign vessel owner does not have a U.S. permanent establishment, the U.S. charterer is required to withhold 30% of the daily charter hire rate and remit it to the IRS. If the U.S. charterer has chartered the vessel “net of taxes”, the charterer will be required to pay the vessel owner the full \$50,000 daily rate and pay the IRS the required withholding. This can have the effect of increasing the true economic cost of the foreign vessel chartered for work in the United States.

Question: What if the foreign owner of the Vessel is a citizen of country that has a tax treaty with the United States, such as Norway?

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Most tax treaties apply only if a vessel is engaged in an international voyage. Foreign vessels that are operating in connection with U.S. OCS operations are not engaged in international voyages and don't receive the benefits of tax treaties.

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