

SEAFARER SUBJECT GUIDE

MARITIME LIEN FOR SEAFARERS' WAGES IN THE USA

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of USA flagged ships and foreign ships which are in the ports of the USA. These rights can be enforced in court, where they are secured and preferred by maritime liens, and enforced by the arrest and forced (judicial) sale of the ship.

This document is not intended to be legal advice, nor does it constitute legal advice.

If a seafarer intends to claim his wages, he is strongly advised to consult a lawyer qualified to practise in the USA.

*A full text version of this Subject Guide including footnotes will become available for subscription in due course. In the meantime if there is a specific inquiry on any Subject Guide, please contact SRI.

1. What is the maritime lien for seafarers' wages? How is it enforced?

- 1.1 The maritime lien for a seafarer's wages is designed to improve the prospects of his claim for wages being paid. The maritime lien automatically arises by operation of law (not by contract) and it comes into existence without a seafarer having to take any action as soon as he renders a service to the ship and his wages are due and not paid. Whenever there is a claim for wages, there is a maritime lien. The right to wages and the right to a maritime lien are therefore co-existent.
- 1.2 The maritime lien is enforced by arresting the particular ship (and not any other ship) and proceeding against the ship. This is known as an action *in rem*. The maritime lien secures the claim for wages by attaching to the ship, its tackle, apparel, furniture or any remaining part of a shipwreck; and travels with the ship into the possession, control or ownership of a third party even if the ship is sold for value to a third party who neither employed the seafarers nor was aware of their maritime lien. The maritime lien also attaches to the freight when the freight has not been paid to the shipowner or master and the seafarers have an enforceable lien on the cargo for the unearned freight due on it.
- 1.3 As the claim advances through the court, it can end in the forced sale of the ship in order to satisfy the claim for unpaid wages. The claim for wages and the maritime lien is accorded a preferred status, so that the claim enjoys a very high ranking and is therefore paid before many other claims against the ship.

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2. Which courts have jurisdiction of seafarers' wage claims?

- 2.1 Any claim by a master or member of the crew for wages must be brought in a court in which jurisdiction may be obtained over the vessel owner for an *in personam* action or over the vessel for an *in rem* action. An *in personam* action may be brought wherever the vessel owner maintains an agent for service of process in the USA or conducts sufficient business to be subject to the long-arm jurisdiction of the USA court.
- 2.2 However, an *in personam* action in either a state or federal court will only result in the obtaining of an *in personam* judgment and it is not secured by a maritime lien on the vessel.
- 2.3 Any claim by a master or member of the crew to enforce a maritime lien for unpaid or under-paid wages must be brought on the admiralty side of a USA District (or Federal) Court, which is the only court that can enforce a maritime lien. Because the maritime lien is enforced by the arrest of the vessel, the action will be brought in the United States District Court in which the vessel is located.

3. Can the courts refuse to hear seafarers' claims for wages?

- 3.1 Each state court has its own separate rules of procedure. The seafarer asserting the claim would obtain jurisdiction by serving an agent for service of process or by attaching the defendant's property, pursuant to a non-resident writ of attachment. These are *in personam* actions and are not secured by maritime liens. Each state has its own rules of procedure, including rules pertaining to transfer to other courts under the doctrine of *forum non conveniens* and forum selection clauses.
- 3.2 The USA District (or Federal) Court sitting in admiralty is subject to its own rules of procedure and statutes. The Wage Statute is applicable both to USA flag vessels and to foreign flagged vessels. The doctrine of *forum non conveniens* has been held to be specifically not applicable to wage claims brought under this legislation. Also, 46 U.S.C. §10313 makes this applicable to seafarers on foreign vessels when in the harbours of the USA and further provides 'the courts are available to the seamen for the enforcement of this section.' Despite this express congressional mandate, some USA courts have held that when an arbitration clause exists in the seafarer's contract or other employment documents, the case must be transferred to the arbitral forum set forth in the arbitration agreement in that it falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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4. Who can claim seafarers' wages?

- 4.1 The proper party plaintiff to claim unpaid or under-paid wages is the seafarer. The master of a documented vessel, under the laws of the USA, shall have the same lien for his wages against the vessel and the same priority as any seafarer serving on such vessel. However, the master of a foreign vessel is not entitled to a lien for wages under USA law, but where the master is entitled to a maritime lien for wages by the law of the flag of his vessel, USA courts will enforce such a lien.
- 4.2 A seafarer's wage lien is assignable provided there was fair and adequate consideration with no fraud or over-reaching. The maritime lien is enforceable before the USA courts through an action brought by the assignee. In the case of a vessel covered by an International Transport Federation ('ITF') contract, the ITF and/or the affiliated union may sue for the seafarer's wages provided the special agreement between the affiliate/ITF/shipowner provides that the contract may be enforced by the ITF/affiliate.

5. Which ships are subject to the jurisdiction of the courts?

- 5.1 The jurisdiction of USA courts with respect to seafarers' wages covers all vessels, both USA flagged vessel and foreign flagged vessels.
- 5.2 A seafarer can only sue for wages if he works on a vessel, which is defined in 1 U.S.C.A. §3 (1997) to include 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.'

6. What is included in the maritime lien for seafarers' wages?

- 6.1 Seafarers have always been considered wards of the court and therefore entitled to the special solitude of the courts. The law provides for payments for penalties in respect of wages that are withheld without sufficient cause. These delay wages, or penalty wages, are likewise entitled to maritime lien status. Awards can be significant. In *Griffen v. Oceanic Contractors*, a wage underpayment of USD \$412.50 without sufficient cause led to a penalty payment of more than USD \$300,000.
- 6.2 Wages have been defined as the compensation allowed to the seafarer for his services on board the vessel and are not limited to base wages specified in the shipping articles or contract of employment. Wages also include overtime, vacation pay, leave pay, and bonuses. Wages do not include trade union dues, national insurance contributions or contributions to pension funds or similar retirement benefits, unless a seaman has the right to withdraw those funds himself.

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7. Can seafarers' wages be claimed if there is no written contract of employment?

- 7.1 An oral contract of employment is enforceable under the laws of the USA. However, USA law requires execution of shipping articles and imposes serious penalties upon the vessel owner if the seafarer is employed without executing the shipping articles. If a seafarer is engaged or employed without executing shipping articles, he is entitled not only to leave the vessel at any time but also to the highest rate of pay from the port of engagement.
- 7.2 There may also be collective bargaining agreements incorporated into the employment agreements and the shipping articles. However, none of these documents may deprive a seafarer of his right to wages and, by extension, the maritime lien, provided the seafarer was in service to a ship. Indeed, USA law provides that the master or the seafarer may not forfeit his maritime lien on the vessel or be deprived of the remedy for which he is otherwise entitled for the recovery of wages. Any such stipulation or agreement is void.

8. Must seafarers' services have been rendered on board the ship?

- 8.1 Seafarers are entitled to wages and to a co-extensive maritime lien if they render the services appropriate to their rank as part of the crew of the ship. They need not always necessarily render the services in or on board a ship, or live on board the ship. To enjoy 'seaman's status' the worker must have an employment-related connection to a vessel in navigation and the worker must contribute to the function of the vessel or to the cause of its mission. The worker must have a connection which is substantial in both duration and nature to the vessel and a worker who spends less than 30% of his time in the service of the vessel navigation will not qualify as a seaman.
- 8.2 Seafarers can therefore earn wages, for example, on shore leave, waiting in a hotel for a ship, during sick leave, during vacation or while doing work ashore as long as the seafarer is permanently attached to a vessel or an identifiable fleet of vessels.

9. What is the ranking of seafarers' claims for wages in the event that sale proceeds are distributed?

- 9.1 When the ship is sold, all the maritime claims against the ship are ranked in order of priority with the objective of being paid. A maritime claim given the highest ranking will be paid first, provided there are sufficient proceeds from the sale of the ship to pay the maritime claim. However, a maritime claim ranking may or may not be paid, depending on whether or not the remaining proceeds are sufficient to pay the claim.

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9.2 The ranking of claims whether or not the ship is a USA flagged vessel is determined in accordance with USA law. A 'preferred maritime lien' has been defined as a maritime lien on a vessel arising before a preferred mortgage was filed, for damages arising out of maritime tort, for wages of a stevedore, for the wages of the crew of the vessel, for general average or for salvage. Preferred maritime liens are paid with preference out of the proceeds of a sale of a vessel and the priority of payment, or the ranking of these liens, is set by jurisprudential rules. The ranking of these maritime liens, from highest priority to lowest is as follows:

- (1) expenses of justice during *custodia legis*, meaning the costs of caring for the ship or vessel while it was in the custody of a court pending the sale of the vessel, including all court costs;
- (2) seamen's liens for wages, maintenance and cure and longshoremen directly employed by the vessel;
- (3) salvage and general average;
- (4) tort liens, including personal injury and death;
- (5) preferred ship mortgage liens for USA flagged vessels;
- (6) liens for necessaries under the Mortgage Lien Act of 1920;
- (7) state-created liens of a maritime nature;
- (8) maritime liens for penalty or forfeiture or violation of federal statutes;
- (9) perfected non-maritime liens, including tax liens;
- (10) attachment liens in cases of action within admiralty and maritime; and
- (11) maritime liens in bankruptcy.

10. Can wages be claimed if the employer is not the shipowner or acts illegally?

10.1 Given the strict liability for the creation of the seafarers' maritime lien, seafarers enjoy the advantage that the maritime lien comes into existence even where the employer of the seafarer is not the owner of the ship. The seafarer has no lien for wages when the master by whom he was employed is in unlawful possession of the ship. A demise or bareboat charterer is responsible for payment of the wages.

10.2 Even where the master and mate use the ship to commit a crime, seafarers have the right to their unpaid wages as well as a reasonable and proper amount for compensation for the damages they may have suffered due to the acts of the master and mate.

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11. Can the seafarer's maritime lien for wages be abandoned or waived by agreement?

- 11.1 A seafarer enjoys the protection of the Legislature given his unequal bargaining position vis-à-vis the shipowner. So, it is enacted that a seafarer on a sea-going ship cannot by agreement renounce his maritime lien and remedies for the recovery of his wages. Therefore, every stipulation in any agreement with a seafarer which is inconsistent with this legislation is void and of no force or effect.
- 11.2 A master or a seaman may not forfeit his lien on a vessel or be deprived of a remedy to which the master or seaman would otherwise be entitled for the recovery of wages.

12. When is the seafarer's maritime lien for wages forfeited or not recognised or extinguished?

- 12.1 A seaman forfeits his wages when he deserts the vessel. For directly refusing to join a vessel or being absent, without leave, from duties without sufficient reason, or being absent without leave for 24 hours, the seaman forfeits his wages for not more than two day's pay or an amount to defray expenses incurred in hiring a substitute.
- 12.2 The maritime lien for wages is extinguished by the payment of the wages; the physical loss of the vessel, or by laches. An unwarranted delay, or laches, in the enforcement of a lien will result in its discharge by the running of time. Laches requires not only a reasonable delay, but a showing of prejudicial harm.
- 12.3 The forced sale of the vessel after an action *in rem* against the ship provides a valid title to the purchaser, free of maritime liens and good against the whole world. The sale of the ship to the state or to a foreign sovereign in its public capacity also discharges the maritime lien. However, the voluntary sale of the vessel to a good faith third party purchaser does not destroy the maritime lien.