

Locke Lord QuickStudy: The American Offshore Worker Fairness Act: Boon to U.S. Mariners or Blow to U.S. Offshore Wind?

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Without a doubt, one of the strongest arguments supporting the buildout of the U.S. offshore wind industry is the enormous potential for the creation of brand new, high paying jobs. Precisely which jobs should take priority, however, are in the eye of the beholder. One need look no further than the U.S. maritime industry to witness the complexity of this issue unfolding in real time in the form of Senate Bill 3705, which is part of the proposed National Defense Authorization Act of 2023 (the “NDAA”). Otherwise known as the “American Offshore Worker Fairness Act,” (“AOWFA”) this amendment to the NDAA, which has already passed the House and is currently pending in the Senate, would dramatically alter the vessel landscape for offshore wind in the United States.

In essence, the AOWFA proposes to limit the number of non-U.S. citizens who may work on foreign-flagged vessels installing offshore wind projects in the United States. Given that the Jones Act already limits the operations of non-U.S. vessels in U.S. waters, the provisions would most significantly affect foreign-flagged wind turbine installation vessels (“WTIVs”) and certain vessels not currently prohibited from operating in the U.S., such as foreign-flagged cable lay and some geophysical and survey vessels. If the AOWFA were signed into law in its original form, as passed by the House, it would impose several significant new restrictions on foreign-flagged vessels engaged in U.S. offshore wind farm installation activity. The AOWFA would apply to any vessel, rig, platform or other vehicle or structure, over 50 percent of which is owned or controlled by non-U.S. citizens that is engaged in exploring for, developing, or producing resources, including non-mineral energy resources, under the authority of the Outer Continental Shelf Lands Act (“OCSLA”), regardless of whether or not the vessel is engaged in coastwise trade. Key new restrictions proposed in the AOWFA include:

- Covered foreign-flagged vessels operating in waters on the U.S. Outer Continental Shelf (which is governed by OCSLA) may, subject to application for an exemption, only employ: (1) U.S. citizens; (2) U.S. permanent residents; or (3) citizens of the nation under which the vessel is flagged.
- If non-U.S. citizens are employed under (2) or (3) above, the number of those so employed cannot exceed 2.5 times the number of crew required to man the vessel in question.
- An exemption granted to a covered foreign-flagged vessel under this provision must be renewed annually, by application, whereas previously no renewal was required.
- Operation of a covered foreign-flagged vessel that is not in compliance with these provisions may accrue penalties of up to \$10,000 for each day the vessel operates in violation.
- Any mariner working aboard a covered vessel would be required to secure a Transportation Worker

Identification Credential (“TWIC”). Previously TWICs were not a blanket requirement for foreign licensed mariners, and were only required by the Maritime Transportation Security Act for workers who require access to secure areas of U.S. maritime facilities and vessels. In order to obtain a TWIC, the TSA conducts a security threat assessment of each mariner to determine eligibility.

As commonly occurs with developments concerning the Jones Act, reaction to the proposed AOWFA has been vocal and polarized. Numerous entities representing the U.S. maritime sector have praised the AOWFA as “closing a loophole” in the existing OCSLA regulatory regime to ensure that the offshore wind industry is required to comply with long-standing crewing laws applicable to the oil and gas sector. They argue that the AOWFA will ensure that the hundreds of new mariner jobs created by the rapidly-scaling U.S. offshore wind industry are secured by U.S. citizens, despite the higher costs attendant to those hires. Not surprisingly, the U.S. offshore wind industry and its proponents have decried the proposed legislation as a “gut punch” to an industry that is just taking off in the U.S., and is therefore necessarily highly reliant on the only existing vessel assets capable of and experienced at installing offshore wind farms – foreign vessels with foreign crews. Opponents of the legislation argue that the U.S. maritime industry not only lacks capable vessels, but also similarly cannot produce qualified U.S. mariners to fill the requisite crew positions on the timetable necessary to meet construction timelines.

As with all such polarizing debates, there is likely a middle ground that would best serve the interests of most concerned. Senator Cassidy recently introduced Amendment 6427 to the NDAA, which proposes to amend the House-passed version of the AOWFA and would provide for alternate terminations of the proposed exemptions. These extended termination windows would likely address, to some extent, both the shortage of offshore wind installation vessels, as well as the lack of qualified U.S. mariners currently available to crew foreign-flagged offshore wind installation assets. Specifically, Senator Cassidy’s proposed amendment would provide alternate termination schedules for four classes of vessels, and further allow those vessels to employ individuals from any nation during the extended period of their exemption. Wind turbine installation vessels would be permitted to employ foreign nationals for a period of 4 years, training vessels for a period of 3 years, and mobile offshore drilling units, drill ships and other installation vessels for a period of 2 years. All regulated vessels would still, however, be required to apply for and secure an exemption in the first instance.

While Senator Cassidy’s proposed amendment certainly does not present a wholesale solution to the dearth of qualified U.S. mariners to crew the large number of offshore wind installation vessels that will be required to meet the expected demand of the next decade, it does mitigate in some measure the draconian limitations proposed in the House-passed version of the AOWFA, providing some runway to train up U.S. seamen while still moving the construction of U.S. offshore wind projects forward on foreign-flagged vessels with qualified foreign mariners in the short term.

We will be watching the developments surrounding the AOWFA in the Senate, as debate regarding the NDAA and its proposed amendments is expected to resume following the resolution of the mid-term elections.

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