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VACCINE COURT

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You receive a call from a potential new client who states they have been injured by a vaccine. The potential client claims they received a flu shot almost three years ago and now they can no longer walk, can no longer work. The potential client is struggling to survive on disability and is on the verge of losing their home that has been in the family for nearly three generations. What do you do?

After a series of lawsuits against vaccine manufacturers threatened to create vaccine shortages, *The National Childhood Vaccine Injury Act*¹ (NCVIA) of 1986 (42 U.S.C. §§ 300aa-1 to -34) acknowledged that vaccine injuries and deaths are in fact very real and that the vaccine injured and their families should be financially supported. The National Vaccine Injury Compensation Program² (NVICP) was created to ensure vaccine supply, the stabilization of vaccine costs, and to establish a no-fault compensation alternative for those injured by vaccines.

NVICP is funded not by vaccine manufacturers, which are immune from liability under the *Vaccine Act*, but rather by a \$.75 per antigen excise tax on vaccines. So, for example, the excise tax for the MMR vaccine (measles, mumps and rubella) would be \$2.25. Twenty-seven years after this program was created, many of us, including lawyers and even physicians, have no idea such a program exists.

According to the most recent data released by the Health Resources and Services Administration (HRSA) in January 1, 2017, since 1988, more than 17,732 petitions have been filed

in the vaccine program. Over that 27-year time period, 15,312 petitions have been adjudicated, with 5,143 of those determined to be compensable, while 10,169 were dismissed. Total compensation paid over the life of the program is approximately \$3.5 billion dollars.

Some of the most common vaccine-related injuries reported are Guillain-Barre Syndrome (GBS) and various types of shoulder injuries related to vaccine administration, or “SIRVA.” Other reactions from a vaccine, such as seizures, encephalopathy, or transverse myelitis, are typically referred to a local personal injury or medical malpractice attorney to file within the client’s respective state court. However, vaccine “injuries” *must* be brought to the Vaccine Court, located in Washington, D.C.

Because there is very little publicity about the vaccine injury program, it is very easy to potentially miss the statutory deadline for filing a claim. A petition for compensation must be filed within three years of the first symptom of the injury after vaccine administration, within two years of the death, or within four years after the first symptom of the vaccine-related injury from which the death resulted.

Currently, there are fifteen vaccines³ covered under this program. It is imperative, when initially evaluating a potential vaccine injury claim, to identify the type of vaccine that caused the alleged injury. Time could be of the essence and, in order to preserve the injured party’s rights within the program, you must determine the »

exact date the alleged vaccine was administered and, to the best of the injured party’s knowledge, when they started to notice any unusual symptoms.

So now that you have determined you may have a potential vaccine injury claim, exactly who can file a claim? To be eligible to file claim for compensation:

- The injured party must receive a vaccine covered by the NVICP and believe they were injured by this vaccine where symptoms have lasted for more than six months or resulted in a surgical intervention while inpatient hospitalized.
- The party alleging the injury is a parent or legal guardian of a child or disabled adult who received a vaccine covered by the program and believes that the person was injured by this vaccine where symptoms have lasted for more than six months or resulted in a surgical intervention while inpatient hospitalized.
- The party is the legal representative of the estate of a deceased person who received a vaccine covered by the program and believes that the person’s death resulted from the vaccine injury.

Vaccine claims are heard before “Special Masters” in the U.S. Court of Federal Claims in Washington, D.C. The respondent is the U.S. Department of Health and Human Services (HHS), which is represented by the Department of Justice. It is a court of nationwide jurisdiction and covers U.S. territories. It is not necessary to be a United States citizen to be eligible for compensation. Most cases take two to three years to complete. The U.S. Court of Federal Claims decides who will be compensated.

Attorneys filing on behalf of the injured party must obtain admission to the Court of Federal Claims Bar. A petition filed by an attorney who has not yet been admitted to the court’s bar will be processed as if it is filed *pro se*. Although attorney’s fees and costs generally

are recoverable under the *Vaccine Act*, the cost of obtaining the Court of Federal Claims Bar membership is not compensable as part of attorney’s fees and costs. By statute, attorneys may not charge any other fee, including a contingency fee, for his or her services in representing a petitioner in the vaccine program.

A notable recovery in the program involved a catastrophically injured child who received five vaccines during a two-month-old well baby visit. Within twenty-four hours, the child developed a fever and sustained repeated seizures, suffered a cardiac arrest, multi-organ dysfunction and developed permanent, severe brain damage, and continued seizures. The \$61 million payout over the child’s expected lifetime will help pay for all medical care, attendant care, home modifications, a wheelchair-accessible van, and residential care with attendants and skilled nursing care, once the child’s parents can no longer care for the child at home.

Being awarded compensation does not necessarily mean that the vaccine caused the alleged injury. The majority of all compensation awarded by the vaccine program comes as a result of a negotiated settlement between the parties in which HHS has not concluded, based upon review of the evidence, that the specified vaccine(s) caused the alleged injury. Genetic and environmental factors are thought to contribute to most vaccine reactions, and defective vaccines are not thought to play a role. If the parties cannot settle, one or more evidentiary hearings could be scheduled.

At the close of the claim, attorneys are eligible for reasonable attorney’s fees and costs for litigation, whether or not the injured party is awarded compensation by the Court, but only if certain minimal requirements are met and filed in good faith. The attorney will submit their actual billable time and costs for litigation to the Court for review and consideration.

Vaccine injury cases each come with their own sad story. When speaking with parents who have lost a child, it takes strength, empathy, and a special type of finesse. Most are in complete disbelief such an injury could even occur because they felt as though they were doing the right thing. It is just as difficult dealing with an adult whose life has changed forever. Helping the injured and their families obtain compensation through the NVICP is extremely rewarding and very interesting work. No case is ever the same. Science is ever-evolving, as is the law.

¹ <http://www.nvic.org/injury-compensation/origihanlaw.aspx>

² <https://www.hrsa.gov/vaccinecompensation/>

³ <https://www.hrsa.gov/vaccinecompensation/coveredvaccines/index.html>



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