



Mitchell Hamline Law Review

## Drilling Down: The Vaccine Act

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The National Childhood Vaccine Injury Compensation Act of 1986 (“Vaccine Act”), 42 U.S.C.A. § 300aa-11 *et seq.*, established a streamlined, no-fault compensation method for injured vaccine recipients to recover compensation. Under the Vaccine Act, a no-fault program was established for monetary compensation petitions to be brought by or on behalf of those injured or killed through the administration of certain vaccines. The Vaccine Act does not apply to all vaccine-related lawsuits, but only to those brought against a vaccine administrator or manufacturer.[1] [#\_ftn1]

To be eligible to file a claim, the vaccine must be covered under the Act.[2] [#\_ftn2] In addition, the effects of the person’s injury must have (1) lasted for more than six months after the vaccine was given; or (2) resulted in death. A claim must be filed within three years after the first symptom of the vaccine injury, or if death resulted, the claim must be filed within two years of the death and four years after the start of symptoms of the vaccine-related injury from which the death occurred.[3] [#\_ftn3]

The Vaccine Act requires exhaustion of its remedies before resorting to state actions while also providing some modifications of state law. In some limited circumstances, the Vaccine Act also preempts state tort remedies. Specifically, unless preempted by the Act, a vaccine administrator or manufacturer may be sued if:

1. the petition has been judged non-compensable or dismissed under the Vaccine Program;
2. the award granted by the Vaccine Program is otherwise rejected by the petitioner; or
3. the vaccine is not covered under the Vaccine Program.[4] [#\_ftn4]

While Congress intended the Vaccine Act to discourage traditional tort actions to protect manufacturers from being liable for damages, the Act does not completely or expressly preempt state law except in certain circumstances. Generally speaking the Vaccine Act preempts state law in actions involving design defect claims and claims of failure to warn the public.[5] [#\_ftn5]

Under the Vaccine Act a petitioner may prevail in one of two ways. First, a petitioner may demonstrate that he or she suffered a “table injury,” i.e. an injury listed on the vaccine injury table that occurred within the time period provided in the table. 42 U.S.C.A. § 300aa-11(c)(1)(C)(i). In such a case, causation is presumed.”[6] [#\_ftn6] Second, where the alleged

injury is not listed on the vaccine injury table a petitioner may demonstrate that he or she suffered an “off-table injury.”<sup>[7]</sup> <sup>[#\_ftn7]</sup>

An “off-table” claim requires the petitioner prove by a preponderance of the evidence that the vaccine at issue caused the injury.<sup>[8]</sup> <sup>[#\_ftn8]</sup> To satisfy the preponderance of the evidence, the court has defined a three pronged test set forth in *Althen v. Secretary of Health and Human Services*.<sup>[9]</sup> <sup>[#\_ftn9]</sup> Under *Althen*, petitioners must establish by a preponderance of the evidence that the vaccination caused the injury by providing (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between the vaccination and injury.<sup>[10]</sup> <sup>[#\_ftn10]</sup>

In sum, practitioners should be aware of the exhaustion of remedies and preemption issues under the Vaccine Act. Given the unique nature of the Vaccine Act and the fact that you must be separately admitted to the United States Court of Federal Claims, potential clients with vaccine-related claims should be referred to an attorney licensed in this area. A listing of vaccine attorneys can be found [here](https://www.uscfc.uscourts.gov/sites/default/files/updated%20vaccine%20attorney%20list%205.1.2018.pdf) <sup>[https://www.uscfc.uscourts.gov/sites/default/files/updated%20vaccine%20attorney%20list%205.1.2018.pdf]</sup> .

<sup>[1]</sup> <sup>[#\_ftnref1]</sup> 42 U.S.C.A. § 300aa-11(a)(2)(A).

<sup>[2]</sup> <sup>[#\_ftnref2]</sup> *See* 42 U.S.C.A. § 300aa-14 for listing of covered vaccines.

<sup>[3]</sup> <sup>[#\_ftnref3]</sup> 42 U.S.C.A. § 300aa-16.

<sup>[4]</sup> <sup>[#\_ftnref4]</sup> 42 U.S.C.A. § 300aa-11.

<sup>[5]</sup> <sup>[#\_ftnref5]</sup> 42 U.S.C.A. § 300aa-22.

<sup>[6]</sup> <sup>[#\_ftnref6]</sup> *Capizzano v. Secretary of Health & Human Services*, 440 F.3d 1317, 1320 (Fed. Cir. 2006).

<sup>[7]</sup> <sup>[#\_ftnref7]</sup> 42 U.S.C.A. § 300aa-11(c)(1)(C)(ii).

<sup>[8]</sup> <sup>[#\_ftnref8]</sup> *Capizzano*, 440 F.3d at 1320.

<sup>[9]</sup> <sup>[#\_ftnref9]</sup> 418 F.3d 1274 (Fed. Cir. 2005)

<sup>[10]</sup> <sup>[#\_ftnref10]</sup> *Id* at 1278.

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