

## Commentary: Why are COVID vaccine injuries treated differently?

By Kathleen Loucks

There are significant differences in the process and compensation for those injured from the COVID-19 vaccine versus other vaccines such as the seasonal flu. As it stands now, those injured by any of the COVID-19 vaccines must file their claim in the Countermeasure Injury Compensation Program (CICP).<sup>1</sup> Claimants have one year from the date they were administered the vaccine to file a claim.

Under the CICP, claimants are entitled to:

- Out-of-pocket medical expenses (no limit).
- Out-of-pocket wage loss (capped at \$50,000 per year<sup>2</sup> with a lifetime cap at of \$379,000).
- In the case of death, a death benefit not to exceed \$389,825.45.<sup>3</sup>

In contrast, other vaccines such as seasonal flu are covered in the Vaccine Injury Compensation Program (VICP).<sup>4</sup> Claimants have three years from the date of onset of injury to file a claim in the VICP.

VICP Compensation includes:

- Out-of-pocket medical expenses (no limit).
- Wage loss (no limit).
- Pain and suffering (limited to \$250,000).
- In the case of death, a death benefit not to exceed \$250,000.<sup>5</sup>

In order to file a claim for a COVID-19 vaccine injury, claimants must suffer death or “serious physical injuries” — that is, injuries that warrant hospitalization or lead to a significant loss of function or disability.<sup>6</sup> Similarly, the VICP requires claimants to have injuries that last for more than six months or require an in-patient hospitalization and surgery.<sup>7</sup>

Last, the CICP program for COVID-19 related claims is not a court but a regulatory process administered by HHS’s Health Resources and Services Administration (HRSA). There are no public decisions available to review and there is no judicial appeal. In contrast, the VICP is administered through the Vaccine Court, part of the United States Court of Federal Claims in Washington, D.C. Cases are handled by Special Masters whose decisions can be appealed. Published decisions are available online.

To date, since 2010, the CICP has paid compensation for 29 claims, totaling more than \$6 million. An additional 10 CICP claims were eligible for compensation after a review of the required medical records and documentation; however, in these cases there were no eligible reported medical expenses or lost employment income for the CICP to compensate. Notably, as of Feb. 1, 2022, the CICP has not compensated any COVID-19 countermeasures claims.<sup>8</sup>

In contrast, since 1988, the VICP has compensated 8,696 claimants as of March 1, 2022 and paid a total of \$4,357,511,715.61 in claims.<sup>9</sup>

In summary, compensation for those injured by the COVID-19 vaccines as compared to compensation for other vaccines such as the flu shot are very different. The timing for the filing of claims is different with COVID-19 vaccine deadlines being one year as opposed to three years from the date of onset for other vaccine injury claims. Notably there is no pain and suffering compensation for those injured by COVID-19 vaccines and claims for wage loss are limited in the CICP but not in the VICP. In the CICP there is no reimbursement for attorney’s fees or costs; the VICP pays separately for



A syringe is prepared with a COVID-19 vaccine at a vaccination clinic at the Keystone First Wellness Center in Chester, Pennsylvania, on Dec. 15, 2021. (AP photo)

attorney’s fees and costs if the claim is brought with a reasonable basis.

As it stands, Congress could add COVID-19 vaccines to the Vaccine Table so that they would be covered in the VICP. First, the CDC must recommend the shots for routine administration to children. Then Congress must pass a law adding the 75-cent excise tax on each COVID-19 vaccine given, and the secretary of Health and Human Services must move the vaccines to the VICP. Whether the COVID-19 vaccine will be added to the Vaccine Court is unknown at this time. There has been no official indication from Congress that this will happen or when. If COVID-19 vaccine injuries are covered in the VICP, there may be a look-back period or additional compensation available such as pain and suffering.

There is recent legislation that could speed up the process to add new vaccines such as COVID-19 to the VICP. The Vaccine Access Improvement Act (H.R. 3656) was introduced by the bipartisan team of Rep. Lloyd Doggett (D-Texas) and Rep. Fred Upton (R-Mich.) on June 1, 2021, with the support of public health officials. Under the current structure, it takes at least two years from recommendation for a vaccine to get on the list of those covered by the VICP. Under the proposed new legislation, HHS would be required to initiate the process within six months of the CDC’s recommendation.<sup>10</sup>

Introduced around the same time, the Vaccine Injury Compensation Modernization Act (H.R. 3655) seeks to reduce delay in the VICP by increasing the number of special masters, to bring compensation caps in line with inflation, as well as increasing the statute of limitations by two years.<sup>11</sup> Unfortunately, H.R. 3655 has been languishing in the House Committee on Energy and Commerce where it has not been marked up and allowed to move forward.<sup>12</sup>

If you have been injured by a covered vaccine, please contact a lawyer who is admitted to the United States Court of Federal Claims who can evaluate and file a claim on your behalf.

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### Endnotes

1. The CICP also covers countermeasures related to COVID-19 as well as injuries from: Nerve Agents, Ebola, H1N1, Anthrax, Botulism, Smallpox, and Acute Radiation Syndrome. Countermeasures Injury Compensation Program (CICP) (hrs.gov). See also, Fourth Amendment to the Declaration under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 and Republication of the Declaration, 85 Fed. Reg. 79,190, 79,196 (Dec. 9, 2020); 42 U.S.C. § 2476d-6d(i)(7); Emergency Use Authorization, FDA, <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#2019-ncov> (last updated Nov. 18, 2021) (listing FDA emergency use authorizations for vaccines, drugs, biologics, and medical devices used against COVID-19).
2. 42 C.F.R. § 110.81 (c)(2).
3. 2021 death benefit. See, 42 C.F.R. § 110.82(b)(1); Benefits by Year: Public Safety Officers’ Benefits Program, U.S. DEPT OF JUSTICE BUR. OF JUST. ASSISTANCE, <https://psob.bja.ojp.gov/knowledge-base/benefits-by-year/> (last visited Nov. 18, 2021).
4. The complete list of vaccines covered in the Vaccine Court is as follows: Diphtheria, Haemophilus Influenza, Hepatitis A and Hepatitis B, Human Papillomavirus, Seasonal influenza, Measles, Mumps, Meningococcal, Pertussis, Pneumococcal Conjugate (e.g., PCV-13), Polio, Rotavirus, Rubella, Tetanus, and Varicella.
5. 42 U.S.C. § 300aa-15(a) – (e).
6. 42 C.F.R. § 110.3 (z); 42 U.S.C. § 247d-6e (e) (3).
7. 42 U.S.C. § 300aa-11(c).
8. Countermeasures Injury Compensation Program (CICP) Data | Official web site of the U.S. Health Resources & Services Administration (hrs.gov).
9. <https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/data/vicp-stats-03-01-22.pdf>.
10. Proposed Laws Aim to Modernize Vaccine Injury Compensation | GW Law | The George Washington University (gwu.edu).
11. National Vaccine Injury Program Needs Modernizing (bloomberglaw.com)
12. Id.