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Sticking Points PART 2

A Survey of Remedies for Vaccination Injuries

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This two-part article provides an overview of federal and state remedies available for vaccine injuries, including COVID-19 vaccinations. It offers practical guidance for practitioners to triage injury claims. This part 2 explores remedies outside the two federal programs discussed in part 1.

Part 1 of this article presented an overview of remedies for vaccination injuries that are available under two federal programs, the National Injury Compensation Program (VICP), which covers the harmful effects of routine childhood and most adult vaccinations, and the Countermeasures Injury Compensation Program (CICP), which covers some damages flowing from "countermeasures" used to combat domestic terrorism and pandemics.[1] This part 2 explores additional federal and state law remedies, including workers' compensation, non-workers' compensation funds, employment remedies, and traditional tort remedies.

Additional Remedies for Vaccination Injuries

In addition to VICP or CICP remedies, where available, a person injured from a vaccine administered in Colorado may pursue one or more of the following remedies, depending on the circumstances of the injury:

- workers' compensation benefits, which include medical benefits and wage replacement benefits, if the employer requires the vaccination.
- medical care under private or public health care plans if workers' compensation benefits are not available.
- wage replacement benefits through disability or welfare programs, regardless of whether the injured person is entitled to workers' compensation benefits, though offsets may be taken against workers' compensation benefits received.
- other state or federal remedies, including civil service and union protections,

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where a person's job, wages, or benefits are jeopardized by an extended absence or unlawful employer discrimination.

- a Colorado tort law claim, if the vaccination is not subject to the VICP or CICP, or if the injured person withdraws from the VICP, as discussed in part 1.

Colorado Workers' Compensation

The Workers' Compensation Act of Colorado (Act)[2] covers injuries "arising out of and in the course of employment."[3] Therefore, an employee who receives a vaccine as a condition of employment and suffers an injury has a compensable injury. The scope of workers' compensation coverage extends to travel to and from the premises where the vaccination was administered[4] and to any additional injury due to treatment for the vaccination's effects.[5]

Even if an employer does not explicitly require a vaccination, claimants may argue that they are entitled to workers' compensation benefits if the vaccination confers a direct benefit to the employer. The availability of this "dual purpose" liability[6] is heightened if the employer encourages or pays for employees to be vaccinated. The success of these claims depends on the specific facts of each case, but it is well established that claimants in other contexts have been compensated when their actions, although not specifically directed or controlled by the employer, have benefited the employer.[7]

However, employees who are vaccinated as part of a voluntary wellness program would not be eligible for workers' compensation unless they can prove by a preponderance of the evidence that they faced explicit or implicit pressure to participate in that program or that management directed employees to use the wellness program to obtain the vaccination.[8]

An employment applicant who receives a job offer conditioned on a vaccination is likely eligible for workers' compensation benefits.[9] On the other hand, a job applicant who has not received a job offer but who receives a vaccine would likely not be covered given the lack of a sufficient nexus between the injury and employment.[10]

Burden of Proof: Accident or Occupational Disease

The burden of proof for a vaccination injury may differ from that for an injury due to contracting a virus, such as COVID-19, at work. To obtain this benefit, claimants must prove, by a preponderance of the evidence, that they have suffered an injury or need for medical evaluation that was proximately caused by the vaccination and the vaccination was an employment requirement. A vaccination injury is an "accident" or "traumatic injury" that is traceable to an event with a certain date and place.[11] Conversely, some diseases, including COVID-19, may be caused by a specific event, but others are better described as occupational in nature because they are caused by multiple exposures over time. The Act defines an occupational disease as one that

- results directly from the employment or the conditions under which work was performed,
- can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment,
- can be fairly traced to the employment as a proximate cause, and
- does not come from a hazard to which the employee would have been equally exposed outside of the employment.[12]

As to COVID-19, contraction of the novel coronavirus may be due to a series of traumatic events that are reasonably traceable to particular times and places, because contraction of COVID-19 usually depends on exposure to a sufficient viral load in the claimant's air space incurred within a certain time period. Accordingly, the resultant injury is better characterized as an "accident" rather than an occupational disease. While categorization of a claim as an "accident" or an "occupational disease" is important for legal analysis (i.e., for identifying parties liable or for apportionment), such categorization may be irrelevant for purposes of obtaining medical treatment or calculating disability benefits.

Available Benefits

A vaccination-injured employee is potentially eligible for the following benefits:

- medical benefits without deductibles or co-payments with designated providers, potentially for life;
- temporary total disability benefits up to the applicable state maximum for total loss of income;
- temporary partial disability benefits up to the applicable state maximum for partial loss of income;

- permanent partial disability benefits based on medical impairment to compensate for future wage loss;
- permanent total disability benefits, which are for life, if the employee can prove inability to earn any wages from the same or any other employer; and/or
- compensation for bodily disfigurement.

Workers' compensation insurance carriers or self-insured employers may also offer vocational rehabilitation benefits, but these benefits are voluntary and are rarely provided.[13] Pain and suffering damages are not available for injured workers.

Procedural Matters

Written claims for compensation must be filed within two years of injury, or within three years with "reasonable excuse," or they will be barred.[14] Notice must be given to the employer of any injury within four working days, and penalties can be assessed for noncompliance, though the claim is not barred due to late notice if the filing requirements are met.[15]

Workers' compensation indemnity benefits may be offset for unemployment compensation benefits[16] and Social Security benefits.[17] An employee can accept both state workers' compensation benefits and federal vaccination compensation program funds, and insurance carriers cannot reduce workers' compensation benefits for receipt of federal program funds.[18] Liens can be placed on workers' compensation benefits only for unpaid child support payments or fraudulently obtained public assistance.[19]

Colorado workers' compensation is an administrative "no fault" system,[20] and eligibility determinations for vaccination injuries focus on causality rather than comparative fault. Apportionment due to preexisting conditions may be applicable,[21] but an aggravation of a preexisting condition is potentially compensable.[22] Generally speaking, workers' compensation is an "exclusive remedy" in the sense that an employee cannot sue an employer for negligence or intentional tort for requiring the employee to undergo a vaccination.[23] Nonetheless, claimants may not be barred from filing a medical malpractice action against a fellow employee whose job is to provide them with medical services.[24] Subrogation is available to the benefits payor due to the malfeasance of a third party responsible for the injury.[25]

Although the legislative intent is for the system to accomplish "quick and efficient delivery" of benefits,[26] the reality is that claims adjudications may take months or even years due to administrative backlogs and administrative and judicial appeals. As a consequence, many contested claims are resolved through settlement.

Federal Workers' Compensation

The federal government provides workers' compensation benefits to employees through several programs, including the Federal Employees Compensation Act (FECA).[27] Injured individuals who work for a federal agency should consult with an expert in federal workers' compensation benefits about applicable statutes of limitations,[28] eligibility requirements, and type of benefits available.

Remedies When Workers' Compensation is Unavailable

If workers' compensation is not available, or while a workers' compensation claim is pending, the claimant may seek various funds to pay for medical treatment and for lost wages.

Medical Treatment

Sources of coverage for medical treatment include

- health insurance
- health care continuation coverage (COBRA)
- Medicaid or Medicare
- public hospital systems
- Veterans' Administration benefits.

The eligibility requirements and the medical services and devices covered by the above funds vary, as does responsibility for co-payments and exhaustion of deductibles. If a health insurance carrier or public hospital has provided emergency services and a workers' compensation claim is later found compensable, the payor or public hospital may be reimbursed for payments made or services provided.[29] However, the ability or willingness to pursue lien rights varies among payors. If subrogation is successfully pursued, the payor is entitled to recover funds paid in strict accordance with the Colorado fee schedule for workers' compensation cases.[30]

Wage Replacement

Individuals experiencing wage loss may apply for one or more of the following:

- accrued vacation or sick leave
- unemployment compensation benefits
- short- and long-term disability benefits
- employer or union wage continuation programs
- employer or union loans
- food stamps or other public assistance
- Supplemental Security Income (SSI)
- Social Security Disability Income (SSDI) or Social Security retirement benefits.

Eligibility requirements and the duration of benefits for these benefits vary widely, and offsets may apply as determined by contract or statute. Notably, the offset against Colorado workers' compensation benefits for receipt of unemployment compensation benefits is 100%.[31] In any case, a workers' compensation carrier may usually take a 50% offset when a worker receives SSDI or Social Security retirement benefits.[32]

Employment Remedies

Employees who lose hours or are in danger of losing their job completely due to extended illness or functional impairment associated with a vaccination injury may be entitled to a variety of federal and state protections, including those under:

- the Americans with Disabilities Act (ADA)[33]
- the Family and Medical Leave Act (FMLA)[34]
- Title VII of the Civil Rights Act[35]
- the Colorado Anti-Discrimination Act[36]
- Colorado State Personnel Board Rules and Personnel Director's Administrative Procedures[37]
- collective bargaining agreements
- employer leave policies
- local ordinances[38]
- common law remedies for wrongful discharge, whistleblowing, and illegal discrimination

- the Occupational Safety and Health Administration Act (OSHA).[39]

EEOC Guidance

On May 28, 2021, before the US Food and Drug Administration's (FDA) full approval of the Pfizer vaccine for adults, which has led to widespread vaccine mandates, the Equal Employment Opportunity Commission (EEOC) clarified an employer's ability to require vaccinations generally and to offer employee incentives for receiving COVID-19 vaccinations.[40] This EEOC guidance provides direction to businesses looking to encourage workers to get vaccinated rather than adopting a mandatory vaccine policy. The EEOC has not revised its guidance since the FDA's full approval of the Pfizer vaccine.

Requiring vaccinations. The EEOC allows mandated vaccinations for all employees, subject to the Title VII and ADA reasonable accommodation provisions and other conditions.[41] Within these limits, an employer can require all or certain sectors of its employees to obtain a vaccination.[42]

The EEOC guidance reiterated that if an employee cannot get vaccinated because of a disability or religious belief, the employer cannot require compliance with a mandatory vaccine policy *unless* it can demonstrate that the individual would pose a "direct threat"[43] to the health and safety of the employee or others in the workplace. This determination should be based on consideration of four factors previously identified by the EEOC (duration of the risk, nature and severity of the potential harm, likelihood the potential harm will occur, and imminence of the potential harm) and "should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19,"[44] including the level of community spread, statements from the CDC, and/or statements from the employee's health care provider. The employer must also consider the employee's specific work environment.[45]

If the employer determines that the individual would pose a direct threat, it must then consider whether a reasonable accommodation would reduce or eliminate that threat, unless doing so would present an "undue hardship"[46] to the employer. The EEOC provides specific examples of potential accommodations, including wearing a face mask; social distancing; working a modified shift; making changes in the work environment (e.g., increasing ventilation or limiting contact with others); teleworking; or as a last resort, reassignment to a vacant position in a different workspace.[47]

Finally, the EEOC cautions that employers should consider all options before denying an accommodation request and that the "undue hardship" consideration may be impacted by the vaccination rate of the workforce and the extent of employee contact with non-employees (whose vaccination status may be unknown).[48]

As to COVID-19, the conservative approach for most employers before the FDA's full approval of the Pfizer vaccine was to strongly recommend, but not mandate, that employees be vaccinated. Under this approach, vaccination arguably is not a term and condition of employment; accordingly, it would be hard for employees who are injured from vaccinations to argue that they were injured within the course and scope of their employment and thus entitled to workers' compensation benefits. But employers seeking to avoid an action for intentional or negligent acts based on a compelled vaccination should take advantage of the exclusive remedy shield that comes with workers' compensation coverage.[49]

Vaccine incentives. The EEOC identifies the following options as employer incentives for vaccinations that are ADA compliant:

- Employers may offer incentives to employees who voluntarily provide documentation or other confirmation of vaccination received from an independent third party (e.g., a pharmacy, personal health care provider, or public clinic). However, any information or documentation collected should be maintained as confidential, as discussed below.[50]
- Employers may also offer incentives to employees for *voluntarily* receiving a vaccine administered by the employer or its agent, so long as the incentive is "not so substantial as to be coercive." The EEOC does not define "substantial," but it explains that "a very large incentive could make employees feel pressured to disclose protected medical information" when responding to the employer's pre-vaccination medical screening questions.[51]

Although employers can offer an employee's family member an opportunity to be vaccinated if certain conditions are satisfied, employers cannot require family members to be vaccinated and should not offer employee incentives for family member vaccinations.

Confidential Medical Information

The EEOC guidance makes clear that employers should maintain the confidentiality of employee medical information, including documentation or other confirmation of COVID-19 vaccination, regardless of where the employee gets vaccinated. Accordingly, while employers can require employees to provide proof of vaccination (i.e., doing so is not a "disability-related inquiry"), this information should be maintained confidentially and separate and apart from the employee's personnel file.[52]

OSHA Claims

OSHA[53] requires employers to provide a workplace free from serious recognized hazards and to comply with its standards and regulations. As employees return to offices and other workplace environments where social distancing is not always maintained and surfaces are not regularly disinfected, OSHA claims may be brought if customers or employees are concerned about contracting coronavirus at the workplace.

President Biden recently directed OSHA to promulgate regulations regarding COVID-19 precautions in the workplace.[54] This announcement was made on the same day the President signed executive orders requiring federal employees and most federal contractors to be vaccinated. Although OSHA has not published those regulations, many employers, including governmental entities, are relying on President Biden's executive action to mandate COVID-19 vaccinations. Until OSHA issues its regulations, it is unclear what rights an employee who does not feel safe working around unvaccinated co-workers may have.

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Colorado Tort Remedies

Part 1 of this article includes a decision tree for determining whether a potential client claiming a vaccination injury was required to first seek VICP or CICP compensation or could instead file state law injury claims directly against a vaccine manufacturer, supplier, or administrator. As discussed in part 1, if the vaccination is identified as a countermeasure under a Department of Health and Human Services declaration pursuant to the Public Readiness and Emergency Preparedness Act (PREP Act),[55] the injured person is likely limited to a claim for compensation under the CICP that must be filed within a one-year statute of limitations. If the vaccine is not a countermeasure but is covered by the VICP,[56] the injured person must first pursue a VICP claim, which has a three-year limitations period. If the injured person pursues a VICP claim but elects to withdraw the claim for delay or to reject a VICP court judgment as permitted by the VICP, the claimant may then pursue state law tort remedies. However, some defective product claims are preempted by the Vaccine Act. Lastly, if the person was injured by a vaccine that is neither a countermeasure subject to the CICP nor a Vaccine Act vaccine subject to the VICP, the claimant can pursue any available tort law remedies without resorting to a federal program.

Available state law claims for a vaccine-related personal injury can be any cognizable cause of action but commonly include claims for:

- negligence or professional negligence for administration errors or errors relating to prescribing a vaccine contraindicated for a specific patient, or failing to properly diagnose or treat a side effect leading to an additional injury;
- strict product liability or negligence against a manufacturer or seller of vaccine that is unreasonably dangerous, even if properly manufactured;
- strict liability or negligence against the manufacturer or seller for an improperly made, packaged, or stored vaccine; and

- other causes of action based on the unique facts and circumstances of the injury.

It is beyond the scope of this article to detail the unique requirements and elements of tort claims. But significant vaccine claim issues that may occur at the intersection of state law claims and federal vaccine injury program claims are briefly addressed below.

Statutes of Limitation

The statute of limitations for most Colorado tort claims for a vaccine injury accrues on "the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence."[57] Vaccination cases asserting general negligence, strict liability and failure to warn claims against manufacturers of products, and claims against health care providers are all subject to two-year limitation periods.[58] Because the VICP and CICP deadlines differ from Colorado's, it is critical for practitioners to preserve the filing deadlines in both federal and Colorado actions. For example, if a practitioner waits more than two years from accrual to commence a VICP claim, which must be filed within three years, and the claim is denied as outside the Vaccine Act's scope, the claimant would likely be time barred from filing a tort claim in Colorado, thus subjecting the practitioner to liability. Practitioners must also evaluate whether the client's claim may be includable in a consolidated multidistrict or class action.[59]

Proving Fault and Causation

Unlike vaccine claims under the VICP or CICP, almost every Colorado tort claim requires proof that the defendant deviated from the standard of care or acted in an unreasonable manner. Causation of injury must also be proved and is not presumptively established from a list, as may be the case under the VICP or, to a more limited extent, the CICP. Cases alleging that an injury was caused by the vaccination process (e.g., Shoulder Injury Resulting from Vaccine Administration (SIRVA))[60] rather than from a reaction to the vaccine itself are typically brought against licensed nurses, doctors, and pharmacists. In cases of professional negligence, the deviation from the standard of care must ordinarily be established by expert testimony offered by a professional in the same practice area.[61] A certificate of review must be filed within 60 days of the complaint and state that an expert reviewed the complaint and the relevant file and determined that the claim against the licensed professional does not lack substantial justification.[62] The need to prove fault and causation in a medical injury case can, of course, be prohibitively expensive and fraught with uncertainty.

Strict products liability cases, which are particularly important for vaccine injuries, do not require proof of fault but present their own daunting proof requirements. A drug designer or manufacturer can be held strictly liable for injuries, without proof of fault, for the manufacture and sale of a defective and unreasonably dangerous product to a claimant injured as a result of the defect.[63] While proof of fault is not required, the plaintiff must prove that the product was unreasonably dangerous due to a manufacturing error or because its design creates risks that are not outweighed by its benefits.[64] In a design defect case, even if the drug was manufactured without error, in determining whether the product was unreasonably dangerous, the court must consider the design's risks and benefits, including the product's usefulness to the public, its ability to eliminate risk without decreasing its utility, and the user's awareness of the inherent risks.[65] In addition, Colorado has rebuttable presumptions that a product is not defective if its manufacturer conformed to the "state of the art" applicable at the time of sale;[66] if the product was initially sold for use 10 years or more before the incident;[67] or if the product complied with applicable codes, standards, and regulations adopted by either Colorado or the federal government.[68] Therefore, while a strict liability claim may avoid the need to prove the manufacturer's negligence, the burden of proving a vaccine to be unreasonably dangerous is no less onerous.

General Tort Law Damages

A claimant who successfully proves fault or that a vaccine is unreasonably dangerous, and that the fault or defect caused injury, can recover allowable compensatory damages under Colorado tort law, including past and future medical expenses,[69] lost income and lost earning capacity, rehabilitation expenses, disfigurement and physical disability compensation, and compensation for noneconomic injuries.[70] In rare but appropriate cases, exemplary damages may be recoverable upon proof that the defendant's conduct was willful and wanton.[71] However, unlike in a VICP claim, a plaintiff cannot recover attorney fees for a successful vaccine injury tort case under Colorado law.

Conclusion

Federal and state law offer a multitude of remedies to clients injured by a vaccination. Proper triaging for legal services begins with identifying the type of vaccine involved and reviewing all potential remedies. And practitioners must pay careful attention to notice requirements, statutes of limitation, and burdens of proof to establish all potential claims. CL




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NOTES

1. Cairns et al., "Sticking Points—Part 1: A Survey of Remedies for Vaccine Injuries," 50 *Colo. Law.* 26 (Oct. 2021), https://cl.cobar.org/features/sticking-points-part-1.

2. CRS arts. 40 through 47.

3. *See generally* CRS § 8-41-301(1)(b) and (c); *Wild West Radio, Inc. v. Indus. Claim Appeals Office*, 905 P.2d 6 (Colo.App. 1995) (regarding "course of employment"); *Gen. Cable Co. v. Indus. Claim Appeals Office*, 878 P.2d 118 (Colo.App. 1994) (regarding "arising out of employment"). *But see Indus. Comm'n v. Messinger*, 181 P.2d 816 (Colo. 1947) (employer mandated blood test was based on a state requirement for a health certificate). The *Messinger* finding is inconsistent with the majority of decisions nationwide where courts have found that employer-mandated vaccinations are compensable. *See* Larson and Robinson, *Larson's Workers' Compensation Law* § 27.01 (Matthew Bender 1997). A cogent analysis of employer liability for COVID-19 vaccination side effects is available at https://www.workcompwrite.com/opinion-mondays-do-employers-face-additional-liability-for covid-19-vaccination-side-effects.

4. *See Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 2 (Colo. 1967). *See also Shandy v. Lunceford*, 886 P.2d 319 (Colo.App. 1994).

5. This theory of liability is called "quasi-course of employment injuries." *See Emps. Fire Ins. Co. v. Lumbermen's Mut. Cas. Co.*, 964 P.2d 591 (Colo.App. 1998); *Excel Corp. v. Indus. Claim Appeals Office*, 860 P.2d 1393 (Colo.App. 1993); *Turner v. Indus. Claim Appeals Office*, 111 P.3d 534 (Colo.App. 2004).

6. Under the "dual purpose" doctrine, an injury sustained while the employee is performing an act for the mutual benefit of the employer and the employee is usually compensable. *Berry's Coffee Shop*, 423 P.2d 2. *See also Deterts v. Times Publ'g Co.*, 552 P.2d 1033 (Colo.App. 1976).

7. *Sec. State Bank of Sterling v. Propst*, 59 P.2d 798 (Colo. 1936). The fact that a vaccination is voluntary does not necessarily defeat compensability claims. The more recent trend is to extend compensability to situations where vaccination is not required but there is a combination of strong employer urging and some element of mutual benefit in the form of lessened absenteeism and improved employee relations. *See, e.g.*, *E.I. Dupont de Nemours and Co. v. Faupel*, 859 A.2d 1042 (Del.Super. 2004); *Wash. Hosp. Ctr. v. Dist. of Columbia Dep't of Emp. Servs.*, 821 A.2d 898 (D.C.App. 2003); *Monette v. Manatee Mem'l Hosp.*, 579 So. 2d 195 (Fla.Dist.Ct.App. 1991). *See also Saintsing v. Steinbach Co.*, 64 A.2d 99 (N.J.Super.Ct. 1949) (during a smallpox scare, employer promoted and paid for vaccination but required a waiver of liability, which did not defeat claim); *Cole v. Pa. Power & Light Co.*, 180 A.2d 272 (Pa. Super.Ct. 1962) (involving a noncompulsory recommendation); *Smith v. Brown Paper Mill Co.*, 152 So. 700 (La.App. 1934) (holding that the convenience of the administration facility and posted notice constituted inducement to undergo vaccination).

8. 29 CFR § 1904.5(b)(2) excuses an employer from reporting any injury or illness that results solely from voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as a physical examination, flu shot, racquetball, or baseball. The authors anticipate that Colorado administrative law judges will not compensate injuries from truly voluntary vaccinations administered in the course of non-compulsory wellness programs but will find work-related injuries where there is pressure on the employee to use the wellness program to obtain a vaccination.

9. *Perry v. Crawford and Co.*, 677 P.2d 416 (Colo. App. 1983); *Stamper v. Hiteshew*, 797 P.2d 784, 785 (Colo.App. 1990) (citing and supporting *Perry*).

10. *See Younger v. City and Cty. of Denver*, 810 P.2d 647 (Colo. 1991) (involving injury during a pre-employment physical agility test).

11. *Delta Drywall v. Indus. Claim Appeals Office*, 866 P.2d 819 (Colo. 1993) (carpal tunnel syndrome was caused by an accidental fall from a scaffold and was not an occupational disease).

12. *See* CRS § 8-40-201(14).

13. The Colorado Legislature ended mandatory vocational rehabilitation benefits effective July 1, 1987. CRS § 8-43-407. Since then, insurance carriers and self-insureds have rarely offered vocational rehabilitation benefits other than in an attempt to defeat a claim for permanent total disability benefits. CRS § 8-42-111(3).

14. CRS § 8-43-103(2). The date of an "accident" or "occupational disease" is a nuanced and complicated issue that is beyond the scope of this article. Practitioners should reach out to an experienced workers' compensation expert to answer this question.

15. CRS § 8-43-102(1)(a).

16. CRS § 8-42-103(1)(f).

17. CRS §§ 8-42-103(1)(c)(I) and -114.

18. There are no statutory offsets in the Act for this situation. If the injured worker's vaccination is a "countermeasure" covered by the CICP or is covered by the VICP, those programs make their benefits, including medical and wage loss, secondary to private insurance and most other government programs, including workers' compensation. *See* Cairns et al., *supra* note 1; 42 CFR §§ 110.31(c) (CICP medical benefits) and 110.32(b) and (c) (CICP wage loss benefits); and 42 USC § 300aa-15 (VICP). Thus, for an injury covered by the VICP or CICP, the workers' compensation medical and wage loss claim, if available, may provide the only source of these benefits.

19. CRS § 8-42-124(1).

20. CRS § 8-41-101.

21. CRS § 8-42-104(5).

22. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990). *But see Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986).

23. CRS § 8-41-102. The "exclusive remedy" doctrine, however, does not bar federal or state statutory and common law remedies for unlawful employment discrimination or individual liability for sexual assaults or certain other attacks by co-employees. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit* (*Tolbert v. Martin Marietta Corp.*), 759 P.2d 17 (Colo. 1988); *Hordyskvj v. Karanian*, 32 P.3d 470 (Colo. 2001); *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

24. *See Wright v. Dist. Court*, 661 P.2d 1167 (Colo. 1983) (doctor hired by employer to treat employees was held to not be a co-employee exempted from a lawsuit for injuries caused in treatment and could be sued in a malpractice action under CRS § 8-52-108). It is an open question whether a company nurse who administers a vaccination to a fellow employee is subject to a malpractice lawsuit; such claims will be determined on the particular facts, including whether the employer is in the business of providing medical services. For example, applying the reasoning of *Wright*, a pharmacist who negligently administered a vaccination to a coworker at a pharmacy may be entitled to the exclusive remedy protection because the employer is in the business of providing vaccinations, among other services.

25. CRS § 8-41-203. Regarding an injury caused by a countermeasure vaccine, however, the US Department of Health and Human Services is subrogated to the injured employer's rights against the workers' compensation benefits provider. *See* Cairns et al., *supra* note 1; 42 CFR § 110.84.

26. CRS § 8-40-102(1).

27. 5 USC §§ 8101 et seq.

28. For example, FECA provides that federal workers' compensation claims must be filed within three years of the injury date. *See* 5 USC § 8122.

29. CRS § 8-42-101(6)(a).

30. CRS § 8-42-1010(3)(a)(I).

31. CRS § 8-42-103(1)(f).

32. CRS § 8-41-203. Colorado is a "reverse offset" state. In many other states, the federal government is allowed to reduce its payment due to the receipt of SSDI or Social Security retirement benefits. *See, e.g.*, *Rosales v. State Dep't of the Judiciary*, 860 A.2d 929 (N.J.Super. Ct. 2004); *Reed v. Mid-States Wood Preservers, Inc.*, 999 So.2d 189 (La.App. 2008).

33. Americans with Disabilities Act of 1990, 42 USC §§ 12101 et seq.

34. Family and Medical Leave Act of 1993, 29 USC §§ 2601 et seq.

35. Civil Rights Act of 1964, 42 USC §§ 2000e et seq.

36. CRS §§ 24-34-401 et seq.

37. Colorado State Personnel Board Rules and Personnel Director's Administrative Procedures, 4 CCR §§ 801-1 et seq.

38. *See, e.g.*, Boulder Revised Code 1981, Title 12, Ch. 1—Prohibition of Discrimination in Housing, Employment, and Public Accommodations.

39. 29 USC §§ 651 et seq. *See also* https://www.osha.com.

40. EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, § K, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. *See also* www.eeoc.gov/coronavirus.

41. EEOC, *supra* note 40 at § K.1.

42. *Id.* at § K.5.

43. *Id.*

44. *Id.*

45. *Id.* at §§ K.1, K.6 (disability), and K.12 (religion).

46. *Id.* at § K.2.

47. *Id.* at §§ K.2 and K.5.

48. *Id.*

49. CRS § 8-41-104.

50. EEOC, *supra* note 40 at § K.16.

51. *Id.* at § K.17.

52. *Id.* at § K.4.

53. *See* https://www.osha.com.

54. OSHA, Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, www.osha.gov/coronavirus/safework.

55. *See* Cairns et al., *supra* note 1; 42 USC §§ 247d-6d and 247d-6e (PREP Act); 42 CFR Part 110 (CICP).

56. *See* Cairns et al., *supra* note 1; 42 USC §§ 300aa-1 et seq.

57. CRS § 13-80-108(1).

58. CRS §§ 13-80-102(1)(a) and (b) (tort claims, strict lability claims, and failure to warn claims), -106(1) (claims against manufacturers and sellers of products), and -102.5(1) (claims against health care providers). Claims against health care providers must be brought within three years of the act giving rise to the claim, even if the claim accrues after the act in question.

59. For example, in 2018 more than 50 actions alleging defects in the design, testing, manufacture, regulatory approval, labeling, and marketing of Zostavax, a shingles vaccine containing the live attenuated varicella zoster virus, were consolidated into a multidistrict litigation in the Eastern District of Pennsylvania. *In re Zostavax (zoster vaccine live) Products Liability Litigation*, MDL No. 2848 (E.D.Pa. 2018).

60. SIRVA injuries are discussed in part 1 of this article. Cairns et al., *supra* note 1.

61. *Melville v. Southward*, 791 P.2d 383, 387 (Colo. 1990). In rare cases where the negligent conduct would be within the common understanding of a lay juror, neither expert testimony nor a certificate of review may be necessary, though presenting that proof may be prudent. *See Martinez v. Badis*, 842 P.2d 245, 249 (Colo. 1992).

62. CRS §§ 13-20-601 and -602(1)(a).

63. *Belle Bonfils Mem'l Blood Bank v. Hansen*, 665 P.2d 118, 126 (Colo. 1983) ("The distinction between negligence and strict liability theories in cases involving drugs, vaccines, and blood is the difference between focusing on the reasonableness of the manufacturer's conduct in the case of negligence, usually measured by the standard of the ordinary prudent person, and on the product's condition in the case of strict liability.").

64. *Union Supply Co. v. Pust*, 583 P.2d 276, 280 (Colo. 1978); CJI Civ. 14:3 (2021). State law design defect claims are preempted in cases arising from an injury caused by a vaccine covered by the Vaccine Act.

65. *Ortho Pharm. Corp. v. Heath*, 722 P.2d 410, 415 (Colo. 1986), *overruled on other grounds*, 842 P.2d 175, 184 (listing seven non-exclusive risk-benefit factors to be considered).

66. *Belle Bonfils Mem'l Blood Bank*, 665 P.2d at 124 ("Evidence that a product conformed to the state of the art has been used in a strict liability action under [*Restatement (Second) of Torts* (Am. Law Inst. 1965)] § 402A to show that the product was not defective.").

67. CRS § 13-21-403. *See also Fraley v. Am. Cyanamid Co.*, 570 F.Supp. 497, 503 (D.Colo. 1983) (10-year presumption not applicable to polio vaccine that had first been sold in 1963 where plaintiff's injury occurred in 1971).

68. CRS § 13-21-403. In addition to these presumptions, Colorado law excludes the admission of any evidence concerning design theory, scientific advancement, or technical knowledge discovered after the time the product was sold, except to show the manufacturer's ongoing duty to warn. CRS § 13-21-404.

69. Unlike claims under the federal programs, under Colorado law the reasonable value of these expenses, rather than amounts actually paid by insurance companies on an injured party's behalf, are recoverable under the collateral source rule. *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 2012 CO 30M, ¶¶ 13 and 14. However, a claimant recovering these damages who has received benefits must address any subrogation claims by the payor of those benefits.

70. Colorado's damage caps apply to claims against vaccine manufacturers or health care professionals prescribing or administering vaccines. Noneconomic pain and suffering damages are limited to $250,000, adjusted for inflation, unless the court finds clear and convincing evidence justifying a higher amount. CRS § 13-21-102.5(3)(a). For claims accruing before January 1, 2020, "the adjusted limitation is $468,010, which may be increased by the court upon clear and convincing evidence to a maximum of $936,030" and for claims accruing after that date, "the adjusted limitation is $613,760, which may be increased by the court upon clear and convincing evidence to a maximum of $1,227,530"), www.sos.state.co.us/pubs/info_center/certificates.html. While physical impairment and disfigurement damages are not noneconomic losses subject to the cap under CRS § 13-21-102.5(5), noneconomic damages flowing from the impairment and disfigurement are. *Herrera v. Gene's Towing*, 827 P.2d 619, 620–21 (Colo.App. 1992). Moreover, in a case against a health care provider, the total value of all damages cannot exceed $1 million, of which only $300,000 can be for noneconomic losses, unless the court finds that the value of economic damages exceeds that limitation and the limitation would be unfair, thus allowing the court to exceed the limitation only for past and future economic damages. CRS § 13-64-302(b).

71. *See* CRS § 13-21-102.