

# A Statutory Primer: Birth-Related Neurological Injury Compensation Act

*By Brad Blystone*



Along with Virginia, Florida is the only state with a statute that provides compensation on a no-fault basis to catastrophic birth injury cases. The Florida Birth-Related Neurological Injury Compensation Act, more commonly referred to as NICA, remains the best cost-saving defense for the most significant birth injury claims. This article will explain NICA's history, evolution, claims administration, and its protections.

## HISTORY

The Florida Legislature created NICA in 1988. The Academic Task Force for Review of the Insurance and Tort Systems called for the creation of a no-fault plan run by the state and funded by all physicians and most hospitals in Florida. The legislature said the plan's purpose would be to provide compensation, irrespective of fault, to certain catastrophic injuries that result in unusually high costs of care.

The legislation served two goals. First, the obstetrician and delivering facility, who are particularly vulnerable to a claim when there is a tragic outcome at birth, are protected from a lengthy legal battle and a large judgment. Second, the injured child and parents are provided compensation quickly without having to prove any fault or negligence actually caused the child's injuries. In short, both sides benefit.

However, despite the obvious benefits, NICA has faced many legal challenges over the years and has been underutilized by physicians and health-care institutions. Attorneys representing injured babies and their families have said NICA takes away their right to a jury trial and undervalues their claims. Obstetricians and hospitals lament its protections are too narrow. Physicians, who do not directly benefit, but help pay for the system, claim it is unfair.

Yet over the last 20 years, it has proven its value to families and health-care providers alike. NICA has provided all the economic assistance, therapy, and medical interventions needed by these injured infants. It's proven to cover the most serious birth-related claims, and it benefits all physicians in Florida by protecting against runaway jury awards for the most catastrophic medical claims.

## CLAIMS

So when and how does an injured baby claim qualify for NICA benefits? Well, first we should look to the definition of a "birth-related neurological injury," which contains both objective and subjective criteria. To qualify, a birth must have the following elements:

1. Live birth in a hospital
2. Weight of 2500g for single gestation or 2000g for multiple gestation
3. Oxygen deprivation or mechanical injury
4. Injury to the brain or spinal cord
5. Injury occurring during labor, delivery or resuscitation efforts in the immediate post delivery period
6. Permanent and substantial mental and physical impairment.

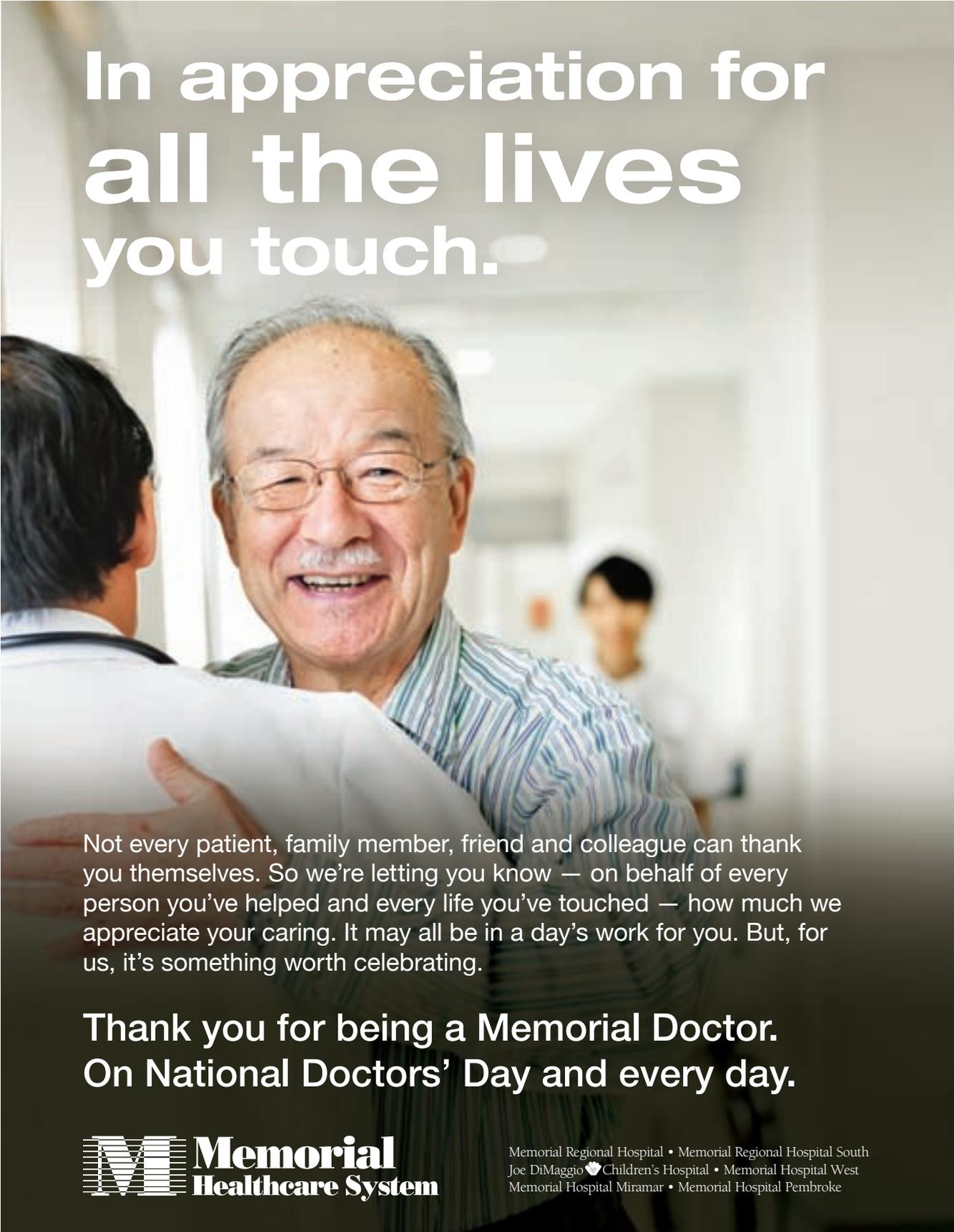
While the criterion appears straightforward, the devil is in the details. For instance, one would normally assume it's easy to distinguish a live birth from a still birth. But what really qualifies as a live

birth? Recently, NICA provided compensation to an infant who never had any spontaneous movement and never took a breath on its own at birth. So why did this birth qualify? It qualified because more than 20 minutes into resuscitation efforts, a faint heartbeat was heard for a few seconds. The child sadly died shortly thereafter, but NICA provided compensation to the parents because the medical reviewer said that a single spontaneous breath, heartbeat, or

movement qualifies as a live birth.

On the other hand, other births that seemingly qualify for NICA benefits have been rejected. In one instance, an infant born with the assistance of a vacuum extractor was found to have a bleed between her skull and scalp and went into shock. Despite heroic efforts, she died just 14 hours after birth.

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NICA rejected the claim because it determined that although the child had an injury to her skull, she did not have direct injury to her brain at the time of birth.

What does this tell us? Each claim must be closely scrutinized from a medical standpoint. A participating physician or hospital has a right to participate in NICA proceedings. When a patient is petitioning for NICA benefits, the involved hospital and physician should immediately intervene in the proceedings. This ensures that the participating hospital or physician is given the opportunity to present evidence proving NICA compensability and thereby preclude any subsequent medical negligence litigation.

Even if a qualifying "birth-related neurological injury" is proven, a claim can be disqualified for benefits for two other procedural reasons: lack of a participating physician or lack of notice.

A "participating physician" under NICA is a licensed Florida physician who either practices obstetrics or performs obstetrical services on a full or part-time basis and pays the yearly NICA assessment. If the physician did not pay his assessment for the year in which the injury occurs, there is no NICA coverage. Hospitals that allow doctors to deliver babies who do not participate in NICA are then subject to multi-million dollar catastrophic injury lawsuits despite having paid into the NICA fund.

Notice is the most common reason NICA

coverage is denied. The law requires that notice of participation in NICA be given by both the participating physician and the hospital. If one gives notice and the other doesn't, the claimant may then choose to forgo NICA benefits and bring a lawsuit against the doctor or hospital who failed to provide notice.

Forms that are provided by NICA, and contain a clear and concise explanation of a patient's rights and limitations, must be used. If the patient signs a form that states they received notice of NICA, it is presumed that notice requirements have been met. Notice of NICA is waived if a pregnant mother is in an emergency medical condition or when notice is impracticable.

The purpose of NICA notice is to give the patient the choice of using a physician who participates in NICA or one who does not. Therefore, notice must be given a reasonable time before delivery.

#### RECOMMENDATIONS

NICA continues to be the best available option for the catastrophic birth injury case. A physician or hospital should always fully avail themselves of

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NICA's protections. This is accomplished by participating in the system through payment of its annual modest premium and providing proper notice of NICA participation to all pregnant patients. By doing so, participating physicians and hospitals are protected from large exposure lawsuits and infants who sustain a brain injury during birth receive life-long quality care.

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