

SHOULD YOUR BUSINESS REQUIRE DIGITAL VACCINE PASSPORTS?

Insights
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Businesses have been hit hard by the pandemic over the last year, with the service and entertainment industries bearing the brunt of the fallout resulting from mandated shutdowns, stringent safety restrictions, and reluctant patrons. As the national vaccine rollout progresses, aided by [President Biden's directive to make the COVID-19 vaccine available to the general public by May 1](#), businesses and employers alike wonder if digital vaccine passports can lead to a path back to normalcy and economic reconstruction. These secure, app-based systems provide documentation which patrons or employees can easily pull up on a mobile device to prove vaccination status against COVID-19, providing the business and other patrons with a sense of safety.

Europe, China, Japan, and Thailand have announced plans to roll out digital passport programs ahead of summer travel. Israel became the first to implement its digitized program in late February, capitalizing on its high vaccination rate. Several airlines and tourism-reliant industries or destinations will also require some form of proof of vaccination for employees and patrons. Domestically, New York is the first U.S. state to launch a digital vaccine program with the Excelsior Pass, which utilizes a voluntary method to provide either proof of vaccination or a negative COVID-19 test prior to entering concert halls, restaurants, and sport arenas. Further, the Biden administration, including the U.S. Department of Health and Human Services and a variety of health, tech and data experts, in conjunction with private companies, are working to develop a standard vaccine passport slated to be introduced in the coming months.

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While the concept seems pretty straightforward – patrons, employees and business owners all want to feel safe – the topic, has provoked heated debate, implicating the potential for legal liability if not done correctly. This begs the question – *Is this right for your business?* This article outlines potential legal and ethical concerns so that you can make the right decision for your organization.

Are Vaccine Passports Legal?

While requiring proof of vaccination may be legal, businesses and employers should carefully evaluate potential legal consequences and practical considerations pertinent to their industry. Although the analysis is unique to industry and individual businesses, the legal protections vary depending on the population(s) – patrons and/or employees – from whom you require proof of vaccination.

For Employers and Employees

Recent guidance issued by the EEOC reminds employers that employees can be required to show proof of vaccination before returning to work – with certain important exceptions. This right, however, is not absolute. Even in the context of digital vaccine passports, employers must be prepared to accommodate situations where employees are unable to receive the vaccine for disability-related or religious reasons.

Under EEOC guidance, if an employee refuses the vaccine due to disability, the employer is obligated to engage in the interactive process to determine the availability of reasonable accommodation without causing the business undue hardship. When confronted with employees refusing the vaccine due to their disability, it is critical employers remember that whether a reasonable accommodation exists is a fact-specific determination. Each interactive process is unique to the individual employee and job.

Another legal implication employers must consider relates to Title VII of the Civil Rights Act, which protects employees who refuse vaccines over sincerely held religious beliefs. Though a business may require employees to provide proof of inoculation, it should be prepared to provide a reasonable accommodation if an employee's sincerely held religious belief prevents them from receiving the vaccination – unless the accommodation would pose an undue hardship.

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For Businesses and Patrons

While businesses and consumers in the private sector look to vaccine passports as key to the return of pre-pandemic sales models for goods and services, individuals with disabilities may be unable to comply. In this regard, the Americans with Disabilities Act (ADA) affords protections for disabled consumers with which your business may have to grapple.

The ADA specifically affords and protects equal access to places of public accommodation (i.e., businesses open to the public) for physically or mentally impaired individuals. Thus, any business requiring a vaccine passport for entry or access should be prepared to face a patron who legitimately cannot receive the vaccination due to medical disability. To state a cognizable claim for disability discrimination, the disabled individual must show the place of public accommodation (1) implements a discriminatory policy or practice, and (2) discriminated against the individual based on disability by failing to offer a reasonable accommodation. Therefore, businesses must make reasonable accommodation(s) for disabled patrons provided that the modification does not constitute "fundamental alteration" of the business. In evaluating whether the modification constitutes "fundamental alteration," it must "be so significant that it alters the essential nature of goods, services, facilities, privileges, advantages, or accommodations offered."

Although there is no precedent applying the law of public accommodations to an individual's inoculation status, it is well settled that a place of public accommodation is not obligated to provide modification *if* doing so poses a "direct threat" to the health and safety of others. Generally, the analysis of a "direct threat" requires individualized assessment based on medical or other available objective evidence. However, in the case of COVID-19 (a virus that does not discriminate in infection and havoc), per the WHO and CDC, anyone can face severe illness or death. Thus, the inquiry rests on whether modifications exist to minimize the "direct threat." Depending on the industry and specific business, appropriate modification may include measures like a negative COVID-19 test, requiring facemasks or other PPE, and social distancing. As the nation slowly moves toward herd immunity, experts will continue to opine on the threats of unvaccinated patrons mingling with vaccinated patrons at places of public accommodation. Businesses

should be ready and willing to adapt the analysis of “direct threat” as medical evidence evolves.

Is It Right For Your Business?

Despite the complex legal risks associated with a digital vaccine passport, one thing is for certain – the endeavor is controversial and raises enormous concerns in several respects.

Health Privacy and Data Sharing

The managing system of the app must be trustworthy, requiring intuitive forethought for an array of factors surrounding design and deployment. Accordingly, resilience to data breaches and the reliability of authentication present monumental challenge. It is important to understand the inherent risks (despite proactive protective measures) in digital data storage to ensure that safeguards are implemented to maintain data security and integrity. This may include necessary assurance that the employer’s smart phone (or other collection device) does not store the employee’s information for any purpose longer than simple verification.

Consumer Hesitancy

Your business may also face consumer objections based on religion, politics, or other philosophical reasons. While these objections may not necessarily afford the consumer a private right of action, they entail marketing concerns businesses should carefully evaluate. Many businesses, especially in the hospitality sector, have seen their business ravaged for over a year. Now that local government entities are permitting businesses to re-open to a greater extent, many of them will not want to create another barrier that will curtail patrons from visiting the establishment. Each organization will not to conduct its own analysis to balance the safety of its employees and fellow patrons with the need to attract business.

Ethical Considerations

The concept of a national vaccine passport has also drawn concern arising from continued inequitable distribution of the vaccine to people of color and poorer communities. In requiring proof of vaccination, vaccinated populations are thus bestowed opportunities that populations without the

same access to the vaccine are not provided. This may lead to distressing and unfair results – professional/upper-class white populations disproportionately allowed into the workplace, shops, sports events, and restaurants, while people of color or members of the working class are disproportionately left out. If an employer requires employees to carry a vaccine passport, segments of a diverse workforce may be negatively impacted. Thus, before adopting a digital vaccine passport, it is critical that businesses evaluate these ethical considerations and remain vigilant in identifying the potential for the disparate impact caused by inequitable national vaccine distribution.

Takeaways

It is still unclear what will happen in the coming weeks and months with respect to the use of digital vaccine passports. Will they be widely used in an effort to bring us back to pre-pandemic life, or are they so fraught with risk that they become little-used oddities? President Biden included a directive for government agencies to “asses the feasibility” of linking COVID-19 vaccinations to international vaccination certificates and producing digital versions of them, which may be a harbinger that digital vaccine passports will be given serious consideration in the general business sector. As it stands, there is no national COVID-19 vaccination certification or “passport” – yet.

While this article covered most of the obvious legal risks involved with such a program, the full extent of the legal ramifications related to digital vaccine passports remain unfolding. If your business is considering requiring proof of inoculation for employees and/or patrons, you should work closely with counsel to weigh the legal and business risks against the health and safety benefit to the business, and society, as a whole.

We will monitor these developments and provide updates as warranted so make sure that you are subscribed to [Fisher Phillips' alert system](#) to get the most up-to-date information. If you have further questions, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney.