Litigation Alert: Legal Questions Surrounding Vaccine Passports

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As the vaccinated population continues to increase, both the Federal and State governments have begun to lift the multitude of restrictions implemented over the past year to combat the spread of COVID-19. The Centers for Disease Control and Prevention (CDC) has begun to issue interim public health recommendations that provide updated guidance on the various activities that vaccinated individuals can safely resume without wearing masks.

As guidance continues to evolve and permissible activities expand, various ethical and legal questions have been raised, with none more polarizing than the constitutionality of vaccine passports. Such passports would require individuals to demonstrate receipt of the COVID-19 vaccination on public identification, and that failure to provide such evidence may result in the denial of entry into businesses. While some believe that such verifications are the key to returning to a pre-pandemic society, others raise concerns of privacy infringement, legalized discrimination, and curtailed civil liberties.

Initial evaluations of the constitutionality of vaccine passports in the context of business entry resulted in determinations that they were likely legal in some form. The groundwork had been laid in 1905, when in *Jacobson v. Massachusetts* the Supreme Court of the United States held that states could require residents to be vaccinated against smallpox or pay a fine. Not only that, but private companies are free to enact their policies subject to certain restrictions, which don't include vaccination status.

In anticipation of businesses and large venues requiring proof of vaccination in exchange for entry, various companies and States have taken action. For example, New York implemented the Excelsior Pass, advertised on the Department of Health's website as a "free, fast, and secure way to present digital proof of a COVID-19 vaccination or negative test results." Similarly, Walmart began offering electronic verification apps to patients vaccinated in Walmart stores to allow for easy access. Certain airlines are already testing apps to allow travelers to easily demonstrate their vaccination status, universities such as Brown and Cornell are requiring enrolled students to provide proof of vaccination, and at least one sports team, the Miami Heat, has opened special "vaccinated only" sections. In early April, Joel White, the executive director of the Health Innovation Alliance, confirmed that seventeen companies and nonprofits had begun developing websites or apps to be used by private companies seeking safety assurances for their customers and employees.

Currently, the legality of vaccine passports remains unresolved and fluid. The White House has already confirmed it will not spearhead a national vaccine passport system or issue a vaccination mandate. This issue has begun evolving at the state level. Florida's Governor Ron DeSantis signed an executive order barring businesses from requiring customers to show proof of vaccination, with a penalty of losing state contracts. In Iowa, the bill House File 889, which has been advanced by the House Judiciary Committee, would prohibit state and local governments (including colleges and airline companies) from including an individual's COVID-19 vaccination status on their identification card and deny state contracts and grants to businesses and government entities who require proof of vaccination before allowing entry onto the premises. Michigan has two proposed bills, one that prohibits state and local governments from issuing vaccine passports and one that prohibits the state's public universities from requiring students to prove vaccination for either enrollment or in-person instruction. Notably, neither of the two bills prohibit private entities from developing or using vaccine passports.

As with the rest of the nation, the issue of vaccine passports remains undecided in New Jersey. Governor Murphy has signaled an openness, while also expressing reservations regarding equity, and stating that New Jersey would follow federal guidance. On the other side of the spectrum, some Republican lawmakers in the state are sponsoring or proposing legislation that would prohibit public agencies or private businesses from asking whether people have been vaccinated or requiring a vaccine passport for entry onto the premises. According to these lawmakers, vaccine passports amount to discrimination over an individual's

vaccine status and infringe on an individual's rights with respect to private health decisions.

With so many unknowns surrounding the legality of vaccine passports, businesses must evaluate the potential legal risks and potential for litigation associated with implementation of programs that may have the consequence of restricting access to customers or visitors. Such risks may include claims of discrimination or bias, claims of infringement on civil liberties and religious freedom, or potential penalties suffered as a result of particular state legislation or orders.

For now, the question of whether or not vaccine passports have become the norm remains unanswered and in the wake of newly proposed legislation, the answer may ultimately vary on a state-by-state basis.

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Disclaimer: This Alert does not address the rights of New Jersey businesses to require employees to obtain the COVID-19 vaccination as a condition of employment and is not intended to address employment issues and concerns surrounding vaccines or vaccine passports.