

Employment Practices Liability

May 4, 2021

Employers & “Vaccine Passports”

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Vaccination of the U.S. population against Covid-19 is well underway. Recently, the United States [hit a record of 4.6 million vaccinations in a single day](#) on April 10, and presently, [36.8% of the population has received at least one vaccine dose, and 22.7% of the population is now fully vaccinated](#).

As vaccinations enable Americans to relax some of the more austere mitigation methods they have been observing for the past year, and more Americans are returning to the office, our national conversation has introduced the controversial concept of “vaccine passports,” or some sort of government or third-party issued credential proving the holder has been vaccinated against Covid-19. Although the Biden administration has indicated that the federal government will not be issuing any such credential, New York State has already [created just such a program, Excelsior](#), in partnership with IBM, and other states are likely to follow suit. So what do employers need to know about vaccine passports, and whether or not they can require employees to show a vaccine passport, if and when available, as a condition of returning to work?

While generally, employers may lawfully require employees to show proof of vaccinations, Covid-19 vaccine passports raise several legal issues employers should be aware of, before requiring employees to present them, if and when they become available.

[Recent EEOC guidance](#) has made it clear that while Covid-19 presents a “direct threat” which waives some of the protections of the ADA, employers ordinarily covered by the ADA and Title VII do not cease to be so simply due to the pandemic. While it may be lawful for employers to have a general policy of requiring proof of vaccination before employees return to work, any such policy must allow for reasonable accommodations of disabilities and/or religious convictions which may prevent an employee from getting vaccinated. Any proof-of-vaccination policy will still need to include exemptions for employees who refuse a Covid-19 vaccine on good faith medical or religious grounds protected by the ADA and Title VII respectively.

Under the ADA, if an employee is unable to receive a Covid-19 vaccine due to a qualifying disability, employers are obligated to engage in the familiar ADA “interactive process” to determine if a reasonable accommodation (which does not amount to an undue hardship on the employer) exists. Providing general guidance for the necessary interactive process is difficult, as each interactive process will necessarily be very fact-specific and turn upon the particular facts of each individual case. Reasonable accommodations of individuals unable to receive the vaccine due to a disability may include the ability to work from home, or the placement of the non-vaccinated individual in a physically separate and socially-distanced work area. As always, when in doubt, it is best to consult with an experienced employment lawyer before potentially implementing a policy that may create liability exposure under the ADA.

Employers must also, pursuant to Title VII, accommodate religious objections to vaccination. For example, while the Bishops of the Roman Catholic Church of the United States issued [a statement on December 14, 2020](#), to the effect that despite the stem-cell tissue used in developing the two mRNA vaccines (Pfizer and Moderna), the connection was to be attenuated to be morally significant and the church is not opposed to them on religious grounds, the Bishops have [hedged this position somewhat](#) with respect to the Johnson & Johnson vaccine. Further analysis of the compatibility of Covid-19 vaccination and Roman Catholic religious observance is beyond the scope of this article, but it should simply suffice to say that Catholic employees may potentially present good faith religious objections to at least some forms of Covid vaccination. Likewise, many Muslims have concern over whether the various Covid vaccines are Halal. Religious authorities in [Egypt and the United Arab Emirates have issued fatwas](#) ruling the Covid vaccines permissible for Muslims, however, the Standards and Metrology Institute for Islamic Countries (SMIIC) [has not yet ruled on whether all, or any, of the Covid vaccines are Halal](#), and therefore employers may expect potential good faith religious objections from Muslim employees as well. This is all simply meant to illustrate several potential areas of religious accommodations employers may need to make with respect to a proof-of-vaccination policy, in order to comply with Title VII.

While there is presently no national, federal initiative to issue vaccine passports, some states such as New York, and some third-party medical data management companies have developed pilot programs, at the behest of industries most hard hit by the pandemic: concert and sports venues, airlines, cruise ships, and others. It is only logical that these efforts will expand as more Americans become vaccinated, but employers should approach any proof-of-vaccination policy with prudence and proper respect for their obligations under the ADA and Title VII. If in doubt, we advise that you consult with experienced employment counsel before implementing any employee policy with respect to vaccine passports.

The attorneys at Rose Kallor, LLP regularly represent and advise private and public sector employers on matters pertaining to the employer-employee relationship, including the selection process, discrimination and harassment related issues and frequently conducts neutral workplace investigations. If you have questions about this legal update, please contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Marketing and Creative Design Associate at jsmith@ccm-ct.org.

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