

Will vaccine passport enforcement lead to legal challenges?

By **Phil Hall** - June 14, 2021

Alabama Gov. Kay Ivey in March signed a bill banning private businesses and public institutions from requiring residents to prove their Covid-19 vaccination status with a “vaccine passport,” an app that contains vaccine information in a digital format. Other states that have similar laws in place banning the passports are Alaska, Arizona, Florida, Texas and Wyoming.



At the other end of the spectrum, New York became the first — and, to date, only — state to offer a vaccine passport. The Excelsior Pass, created in partnership with Armonk-headquartered IBM, was launched in March and has generated more than 1 million downloads.

And somewhere in the middle are the majority of states, including Connecticut, which have not addressed whether a vaccine passport should be mandatory or banned.

In planning responses to the pandemic, neither the federal government nor state governments initially considered whether requiring or displaying proof of vaccination would fit into a post-pandemic environment.

“You are watching the social movement lead to a legal answer,” observed Mark Carey, owner of the Southport law firm Carey & Associates PC. “I am unaware of any current law requiring vaccination passports for individual activity or related to employment. They will be making this as they go.”

During the Bridgeport Regional Business Council’s recent webinar “Employer’s Guide to Covid-19 Vaccines and Returning to Work,” Gary Phelan, attorney with the Stratford law firm Mitchell & Sheahan, said that the federal Occupational Safety and Health Administration recently issued guidance that “workplaces should not distinguish between workers who are vaccinated and not vaccinated. So, that’s the guidance we have to respect in regard to the workplace.”

Phelan also told the webinar audience that employers can mandate that employees receive vaccines, with several key exceptions.

“The first is if a person with a disability and who, for whatever reason, is not able to get the vaccine,” he said. “Then you focus on the person and how you can accommodate them. The second exception is for people with sincerely held religious beliefs who, therefore, will not get the vaccine. Again, the question is whether there’s an accommodation and would it lead to an undue hardship.

“The third caveat,” he continued, “is for unionized workplaces — something that’s subject to collective bargaining.”

Legal experts point out that arguments about First Amendment rights have not been successful in arguing against requirements to affirm vaccination status.

John Thomas, law professor at Quinnipiac University School of Law, pointed to the 1905 U.S. Supreme Court ruling on *Jacobson v. Massachusetts*, in which a pastor named Henning Jacobson argued unsuccessfully that he had a right to refuse a smallpox vaccination. The court upheld the authority of states to enforce compulsory vaccination laws if public safety was at risk.

“This gave the state police power to protect public health,” Thomas said, adding that businesses could use vaccine passports in the manner in which retailers enact “a no shoes, no shirt, no service policy that controls circumstances where customers can patronize their premises.”

Likewise, an argument that vaccine passports violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA) would probably not get far in court.

“HIPAA doesn’t really address the situation,” said Sal Gangemi, partner in the Stamford office of Murtha Cullina LLP. “HIPAA exists to protect sensitive medical information. It only applies to when a health care provider and health insurance show private medical information to third parties. HIPAA doesn’t apply to being prevented from going into restaurants or stores.”

However, today’s social and partisan climate could influence shifts in legal precedent.

“The Supreme Court today is more likely to strongly defend religious freedom than it was in the past,” said Robert Bird, law professor at the University of Connecticut. “It is inevitable that there will

be a legal challenge. No one knows how the court will react.”

Gangemi theorized that possible legal challenges to vaccine passports could involve charges of racial discrimination.

“There could be an opportunity for a civil rights case alleging discrimination against certain demographics based on the particular group not having equal access to receiving vaccine in the first place,” he said.

The ACLU of Connecticut has highlighted the potential for discrimination in the event the state were to veer in favor of vaccine passports.

“Given the state’s deeply inequitable rollout of the Covid-19 vaccine to date, creating preferential access to employment, housing or public accommodations on the basis of vaccination status would likely worsen existing racial, disability, and economic disparities in our state, which would undermine rather than uplift the goal of healthy communities,” Connecticut ACLU Executive Director David McGuire said.

“Instead of conjecturing about potentially problematic measures that may not work, we encourage the state to focus on creating an equitable vaccination rollout that truly includes people with disabilities and Black and Latinx people, and on robust public education efforts regarding the vaccine.”



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