

May Businesses Lawfully Exclude Consumers Not Vaccinated Against COVID-19?

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While the global COVID-19 pandemic continues to upend the lives of millions, there may soon be light at the end of the tunnel. The United States Food and Drug Administration has approved three COVID-19 vaccinations for use by Americans. Over 85 million Americans have been fully vaccinated to date, and more will be fully vaccinated in the coming weeks and months. A semblance of normalcy may slowly return as more people receive a vaccination.

But what about those who do not, cannot, or refuse to get vaccinated? The Biden administration stated that the federal government will not mandate COVID-19 vaccinations—as such a mandate from the federal government will likely face Constitutional challenges. Although some state governments may require COVID-19 vaccinations, many states are unlikely to impose such mandates. Regardless, it may take months or even years before everyone who wants a vaccination gets access to one. Restaurants, gyms, and retail stores cannot wait that long before fully re-opening their doors. Businesses, however, will also likely have to continue to impose safety measures in the coming months to remain open and maintain a virus-free environment.

One potential measure some businesses may take to reduce risk and to attract consumers is to require consumers to produce an “immunity passport” as a condition of entry. For months, experts have debated the use of “immunity passports”: documents attesting that a person who previously contracted COVID-19 and has antibodies making her immune. Such passports could be applied to vaccinations for businesses to feel confident that they are serving only consumers who are free from COVID-19. However, as was the case at the outset of the pandemic when facemask requirements became a reality of life, an immunity passport requirement may face challenges from consumers claiming that such imposition unlawfully discriminatory.

Federal law generally prohibits businesses from discriminating against consumers based on race, sex (including sexual orientation and gender identity), religion, color, or nationality. Some states go further and offer additional protections unavailable under federal law. Generally, to prove unlawful discrimination, a plaintiff must show that she: (1) is a member of a protected class; (2) attempted to contract for services and afford herself the full benefits and enjoyment of a public accommodation; (3) was denied the full benefit or enjoyment of a public accommodation (hotels, restaurants, retail stores, movie theaters, etc.); and (4) such

services were available to similarly situated persons outside the plaintiff’s protected class who received full benefits or who were treated better than the plaintiff.

Consumers may claim (as many have claimed with respect to face-coverings), that requiring consumers to produce an immunity passport requirement to enter a store, hotel, restaurant, or gym is discriminatory because it singles out certain protected classes for exclusion. Members of religious denominations that either prohibit or discourage members from receiving vaccines, for example, may argue that the policy discriminates against them based on their religion. In other words, the business is intentionally or effectively excluding certain consumers from enjoying a business that is open to the public because they belong to a certain religious group with certain beliefs about vaccines. Similarly, consumers may argue that an immunity passport policy is racially discriminatory because statistics suggest white consumers have easier access to vaccines and are generally vaccinated at a higher rate than minority consumers—meaning that some consumers are effectively precluded from entering certain businesses because of their race.

Businesses, in response, may argue that an immunity passport requirement is not unlawful because consumers who are not vaccinated against COVID-19 are not a protected class. Neither federal law nor many state laws prohibit discrimination by a business against a consumer based on the consumer’s medical status. Furthermore, consumers who are not vaccinated against COVID-19 are arguably not “similarly situated” with consumers who have been vaccinated for an immunity passport requirement to be unlawful discrimination. Businesses are entitled to refuse to serve patrons for non-discriminatory reasons, such as to maintain the health and safety of other patrons. An immunity passport requirement would apply to everyone entering the store without regard to one’s race or religious affiliation, just like with facemasks—a mandate that numerous courts around the country already found Constitutional. Thus, an immunity passport policy applied across-the-board would probably be deemed to be a lawful, non-discriminatory policy necessary for a business to protect the health and safety of its patrons.

It remains to be seen whether businesses will employ immunity passport policies, what types of documents would be required, or how a court would rule in response to a legal challenge. Unless there is a change in the law to specifically prohibit discrimination against an individual based on her medical or vaccination status, however, businesses may be able to refuse to serve consumers who cannot prove they are vaccinated. Businesses, in fact, may feel pressure to do exactly that to get consumers through their doors.

Although no formal immunity passport system currently exists, as vaccinations continue, the idea may return anew. But this is a rapidly evolving area of law. Therefore, any business owner wishing to implement an immunity passport policy should consult with experienced legal counsel first. Our new reality, sooner rather than later, however, may be businesses with employees at the front door checking patrons for their immunity passports. No pass? No service.