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Expert Q&A: COVID Passports and Employment
by Practical Law Labor & Employment

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An Expert Q&A with Loren Gesinsky and Julia Gorham, Labor and Employment Partners at Seyfarth Shaw LLP, on issues facing employers considering the use of COVID-19 passport systems for establishing privileges, terms, or conditions of employment based on an employee's COVID-19 vaccination, immunity, or testing status. The Q&A includes a discussion of practical considerations and risks and rewards of using these systems.

With the rollout of COVID-19 vaccines accelerating and vaccine eligibility now anticipated for all adults in the US by May 2021, employers are looking ahead to understand how this affects their workplaces and employment relationships. For example, many employers are assessing whether to monitor employee vaccination rates and how, if at all, their employees' vaccination or immunity status affects their privileges, terms, or conditions of employment. One of the thorniest issues generating buzz among employers is the use of COVID passports, a method to track COVID-related metrics, such as an individual's vaccination status, immunity or antibody level, and negative COVID-19 test results. Like many of the challenges facing employers during this pandemic, COVID passports raise more questions than there are answers, as the legal, factual, and scientific landscape surrounding these issues is evolving rapidly.

To help employers understand these challenges, Practical Law reached out to Loren Gesinsky and Julia Gorham, Labor and Employment Partners in Seyfarth Shaw LLP's New York and Hong Kong offices, respectively. Both have been active in Seyfarth's COVID-19 Task Force since the beginning of the pandemic, counseling employers, writing, and speaking in this dynamic area.

Loren has spent more than 25 years counseling, negotiating, and litigating in partnership with employers on a broad range of pressing and high-value workplace issues. Loren has helped employers early-identify and address emerging trends in areas like COVID-19, Diversity, Equity, and Inclusion (DEI), Environmental, Social, and Governance (ESG), and the increasing use of remote work arrangements both in the US and, in cooperation with Seyfarth's international colleagues, globally.

Julia has been based in Hong Kong for most of her nearly 20 years of practice that began in the UK. Julia has focused on helping employers (both as external counsel and for nearly four years as in-house counsel at an investment bank and during numerous secondments) tackle the big-ticket legal issues in the Asia-Pacific (APAC) and Europe, the Middle East, and Africa (EMEA) regions, which requires a sophisticated understanding of cross-cultural approaches, differences in societal tolerance levels and norms, and different economic climates political agendas.

What is a COVID passport?

A COVID passport is an electronic or physical record of an individual's COVID-19 status regarding:

- Vaccination (date of each dose, type, and location).
- Testing results (for any or all of viral load, antibody, or immunity status).
- Medical or religious exemptions from vaccination eligibility or requirements.

COVID passports may also track an individual's movement and location for purposes of contact tracing after a potential COVID-19 exposure.

A COVID passport can mean different things in different contexts. As most commonly used, it refers to a form of data verification intended to be applied across more than one entity or jurisdiction, similar to a travel passport issued by one country but recognized in other countries. Although employers may use COVID passports with their employees, they are not limited to the employment

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context, and typically are created by a governmental entity or third-party provider for broader uses.

While the concept of a COVID passport is new and lacks any clear definition, a COVID passport generally is distinct from other methods an employer may use to promote healthy and safe in-person interactions among its employees. For example, an employer may request or require verification of an employee's vaccination or testing status as part of its workplace protocols to prevent the spread of COVID-19 without using a COVID passport. In contrast, Israel's already activated Green Pass system, which allows its citizens a "green light" granting them greater access to travel, entertainment venues, and other activities, clearly falls within the generally understood meaning of a COVID passport.

COVID passports typically track more than just an individual's vaccination status, and may allow multiple pathways for an individual to gain greater privileges. For example, if a COVID passport is required to access certain activities or venues, such as travel, sporting events, or indoor concerts or theatres, an individual may be able to get "green" status allowing them access by one of several means showing that the individual is at reduced risk for transmitting or contracting the virus. While the science is rapidly evolving, individuals may be able to show this by any or all of:

- Proof that the individual is fully vaccinated (for the CDC's current definition of fully vaccinated, see CDC: When You've Been Fully Vaccinated (updated April 2, 2021)).

- Proof of full recovery from COVID-19 (such as proof of a recent positive viral test followed by a negative test and certification that they are symptom-free) within a reasonable period of time.

- In some jurisdictions, a recent negative PCR COVID-19 test result.

For more on other COVID-prevention and vaccination policies and protocols, see:

- COVID-19 Prevention Program in the Workplace Checklist.

- Standard Document, Infection Prevention and Control in the Workplace Policy.

- Practice Note, Vaccination in the Workplace.

- Standard Document, Employee Vaccination Policy (Mandatory).

- Standard Document, Employee Vaccination Policy (Voluntary).

What are the different technologies an employer may use to implement a COVID passport program? Do different technologies carry with them greater or lesser risk?

There are several different passport systems and applications currently being used or in development in various jurisdictions. Israel's Green Pass issued by the Ministry of Health allows vaccinated people to download an app showing their vaccinated status or proof of recovery from COVID-19. The Green Pass has been implemented nationwide for multiple uses, such as allowing access to indoor venues or participation in certain activities.

In the US, New York became the first state to offer individuals the ability to enroll in the Excelsior Pass, a mobile application used to show digital proof of an individual's COVID-19 vaccination or recent negative test results to gain access to certain venues or events. The Excelsior Pass is based on IBM's digital health pass system and uses blockchain technology to ensure that individuals' health information remains confidential and secure. Participation in the Excelsior Pass is voluntary.

On the other end of the spectrum, Florida's Governor Ron Desantis issued an executive order on April 2, 2021 banning:

- Government entities from issuing COVID passports or passes for purposes of publishing an individual's vaccination status.

- Businesses from requiring proof of COVID-19 vaccination or post-transmission recovery to gain access to any facilities or services.

Private organizations and entities worldwide are announcing plans to implement one or more forms of a COVID passport, ranging from a simple confirmation of an individual's vaccination status reflected on a paper record or handheld device to more elaborate systems.

Employers should understand the potential liability risk if they use a technology relying on employees' biometric data. While vaccination status alone is not currently deemed biometric data in the US, a fingerprint scan or facial recognition tool used to access an application does involve biometric information. Several state laws impose requirements and restrictions on entities that use, collect, store, or disseminate biometric data, including the Illinois Biometric Information Privacy Act (BIPA). BIPA creates

substantial remedies enforceable through a private right of action for violations of the statute. For more information on BIPA and other biometric privacy laws in the US, see Practice Note, Biometrics in the Workplace.

How might employers use a COVID passport to facilitate reopening their workplaces? Are some industries or businesses more suited to using a COVID passport than others?

Employers have had to adapt to many workplace policies and health and safety protocols that likely were unheard of pre-pandemic. Face mask mandates, social distancing policies, and temperature and health screenings are integral to employers' reopening protocols and have now become a way of life for most employers with in-person workers. (For sample policies, see Standard Documents, Employee Face Mask Policy, Social Distancing Policy, and Employee Temperature Check and Health Screening Questionnaire.) Occupational Safety and Health Administration (OSHA) compliance has recently taken center stage for many office-based businesses previously only marginally affected by workplace safety issues.

With the availability of vaccines and vaccination rates increasing daily, tracking a workforce's immunity status, and the degree to which they have achieved "herd immunity," is likely the next new normal on the reopening front. Employers are facing decisions about whether and how to gather and track this information.

Private employers currently have no obligation to require COVID passports as a pre-condition to working at the employer's facilities or interacting with customers or the public. They similarly have no obligation to require employees to get vaccinated, although the EEOC and various state agencies have stated that it is permissible for an employer to require employee vaccinations if the employer makes reasonable accommodations for protected disabilities and religious beliefs (see Practice Note, Vaccination in the Workplace: Mandatory Vaccines: ADA and Title VII Issues). Nonetheless, employers remain obligated to comply with federal, state, and local health and safety standards and guidance (see COVID-19: Employment Law and Development Tracker). Employers' infection prevention protocols may already require COVID-19 testing and contact tracing to ensure that they know if any staff is infected or has been in

close contact with a COVID-infected individual, whether working onsite at the employer's business or at third-party customer or other locations (see Standard Document, Infection Prevention and Control in the Workplace Policy and COVID-19 Prevention Program in the Workplace Checklist).

Employers that want or need workers to be back onsite, interact with members of the community, or travel can benefit from more rigorous infection-protection protocols. These employers are the ones most likely to benefit from adopting or recognizing one or more forms of a COVID passport (if not prohibited in their jurisdictions). Some employers, such as those in the health care industry, may currently or in the future be subject to specific requirements or recommendations regarding vaccination status or COVID passports. Conversely, for those businesses where staff can work safely and productively from home or in another remote location, or that operate in a single location and do not require business travel, the issue of COVID passports is less pressing.

Private employers should begin considering whether and where their business may be subject to expectations or requirements to implement COVID passports that may arise from:

- Government guidance and mandates (federal, state, and local, and international if applicable).

- Travel-provider guidance and mandates.

- Approaches coordinated or recommended as best practices by industry or sector trade groups or regulation.

- Requirements for entry to businesses imposed by property owners.

- Business needs.

- Workforce expectations.

What are the major compliance areas or legal risks for employers considering a COVID passport system?

Employers first must determine whether they can or must require their employees to comply with or participate in an available COVID passport system operated by relevant stakeholders, such as governments, travel providers, or property owners. If so, there are additional employment law issues to consider. For example, employers with a

unionized workforce may be required to consult or bargain with a union or its representatives as a mandatory subject of bargaining before implementing any COVID passport program (see Subjects of Collective Bargaining Chart).

Employers also must comply with federal, state, and local equal employment opportunity (EEO) and anti-discrimination laws. They must be prepared to grant reasonable accommodations to employees with a disability (as defined under applicable law) or a sincerely held religious belief that prevents them from getting vaccinated, such as reassigning them to a role that does not require vaccination or allowing (or continuing) remote work. This is much like the accommodation requirements employers must make if they choose to implement a mandatory vaccination policy (for more on those requirements, see Standard Document, Employee Vaccination Policy (Mandatory): Drafting Note: Accommodation and Exemption Requests). Moreover, if an employer grants privileges of employment (such as business travel or conference attendance opportunities) to vaccinated individuals that are unavailable to unvaccinated individuals, even if on a voluntary basis, it also may risk discrimination claims from those who have not been vaccinated for a protected reason (see Standard Document, Employee Vaccination Policy (Voluntary): Drafting Note: Employee Incentives for Vaccination). Employers similarly should use caution before disciplining or terminating employees who refuse to participate in or raise objections to a COVID passport system, as doing so may create risks under anti-discrimination laws or violate workers' rights to engage in protected concerted activity under the National Labor Relations Act (NLRA) (see Practice Note, Discipline and Discharge Under the National Labor Relations Act: Discipline that Restrains Protected Concerted Activity).

Conversely, requiring employees to present a COVID passport before entering the workplace or interacting with clients or members of the public may help demonstrate the employer's commitment to health and safety measures and potentially limit liability if an employee contracts COVID-19. In some jurisdictions, the failure to mandate staff use of COVID passports might be claimed as a potential rationale for liability on the theory that the lack of a mandate demonstrates a failure to take reasonable and necessary measures to protect the safety and health of workers and other individuals.

For more on various employment risks arising from COVID-19 generally, see Business Reopening and Return to Work Checklist and Mitigating Employer Reopening Liability Checklist.

Are there data privacy and security concerns for employers using COVID passports?

Issues of data privacy, data collection and usage, and data security are other key facets of any risk assessment for employers using a COVID passport. Employees may resist participating in these systems because of perceptions of an excessive surveillance culture and encroachment on privacy and personal autonomy. Employers must understand whether the laws of any applicable jurisdiction govern the technology used in the adopted COVID passport system, including, for example, whether facial recognition technology is being used that collects employees' biometric data. Employers with international operations overseas must be aware of and comply with what are typically even more stringent and complex data privacy laws than in the US.

Employers should be prepared with contingency plans to address the increased identity and data theft risks, as well as the potential for "black market" vaccine cards with fraudulent information.

For more on employee privacy issues, see:

- Practice Note, Privacy in the Employment Relationship.
- Practice Note, Electronic Workplace Monitoring and Surveillance.
- Employee Privacy Laws: State Q&A Tool.
- COVID-19: Data Privacy & Security Guidance on Handling Personal Data During a Pandemic (Global) Tracker.
- Data Privacy & Security Global Coronavirus Toolkit.

What other risks should employers consider in connection with COVID passports?

Employers may want to check with their insurance brokers on how, if at all, recognizing or requiring one or more forms of COVID passports may impact their risk-management profiles. For example, if COVID passports become an accepted best practice, and one or more passport programs are accepted as the passport "gold standard," insurers may offer benefits or discounts to those engaged in business travel if they use the preferred passport system. If done correctly, recognizing or requiring one or more forms of a COVID passport also

may be viewed as a reasonable measure taken to satisfy an employer's obligation to provide a safe and healthy workplace and reduce associated liability risks. For more on common COVID-19 liability risks, see Mitigating Employer Reopening Liability Checklist: Recent COVID-19-Related Lawsuits.

How can employers help alleviate employee concerns about a COVID passport program?

Employers should understand the prevailing attitudes among their employee populations, much as if they were considering implementing a voluntary or mandatory vaccination policy. Surveying employees and other stakeholders and communicating respectfully, transparently, and patiently with them about their concerns can go a long way towards counteracting potential perceptions of employer intrusion. Explaining to employees that a COVID passport may have benefits outside the workplace, such as granting them access to certain sporting and other live entertainment events or personal travel opportunities, may help alleviate their concerns and encourage employee buy-in. As COVID passports become more common, they are more likely to be an accepted part of the social compact between employers and employees and beyond.

What should employers do about this now?

Employers sometimes want to be among the first of their business peers to adopt a new workplace technology or safety protocol. But employers should be cautious about jumping on the COVID passport bandwagon too quickly. Given how quickly the legal, political, and scientific landscape is changing, there may be advantages to waiting for more developed guidance on using COVID passports to coalesce. Most optimistically, if the US population achieves true herd immunity, the need for and relevance of COVID passports may diminish. Though this is unlikely to occur for years in the global, multi-national context, individual countries such as the US or China may achieve herd immunity in the not-too-distant future (like Israel seems close to having already achieved), especially once vaccines are approved for children (which appears to be forthcoming) and teens (which is already happening).

As with all things COVID, there is no one-size-fits-all approach and employers must carefully analyze the risks

and rewards given their industry and business needs. After carrying out an initial review and risk assessment of the relevant issues in the context of their specific business and jurisdiction, employers should:

- Identify the areas of the business where COVID passports are most likely to be first encouraged or mandated.

- Review the business impact of COVID passports, such as by asking:

  – whether using COVID passport systems gives the employer a competitive advantage and helps increase business activity, or is it more likely detrimental;

  – if employees work in multiple jurisdictions, whether a standardized approach can satisfy all applicable compliance requirements or whether the employer is prepared to adopt divergent approaches to COVID passports across jurisdictions; and

  – if there are alternative and less intrusive measures to appropriately manage the health and safety of the workforces and those with whom they interact.

- Review the workforce composition by segment, including by asking:

  – whether the relevant authorities mandate or stakeholders strongly urge using a COVID passport for certain categories of workers;

  – which workers or categories of workers require in-person interaction with one another;

  – which workers are required to visit third-party sites or interact with members of the public; and

  – whether staff needs to travel across jurisdictions domestically or internationally for work.

- Consider which operational policies and procedures, such as travel, data privacy, insurance, and benefits, may be impacted or touched by a COVID passport rollout.

- Be realistic about the employer's organizational and operational capabilities to roll out and utilize a high-tech system. Consider using existing programs in the market or recognizing individuals' compliance with government- or other-third-party-mandated COVID passports as sufficient to protect the business.

- Ensure that HR teams are briefed and up to speed on the issues and can field questions from the workforce appropriately.

- Ensure that data management processes and policies are up to date and that internal stakeholders understand

the unique issues with personal health-related data arising from using COVID passports, including how to maintain confidentiality and store it securely.

The issues surrounding COVID passports tracking vaccination and immunity status are evolving rapidly. Guidance, regulation, and best practices are likely to change dramatically over the coming weeks and months.

Employers must continually reevaluate their understanding of stakeholder perspectives and update their internal roadmaps and remain flexible and nimble enough to adapt as changing circumstances warrant. Each organization's unique circumstances requires customization and continual revision based on its sector, jurisdiction, workforce makeup, and business and social cultures.

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