

COVID-19 Vaccine Passports & Policy in the Workplace

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What is a COVID-19 vaccine passport?

A COVID-19 vaccine passport is a document that serves as proof that an individual has been fully vaccinated against COVID-19. Vaccine passports can be used to regulate international travel or to limit the access of unvaccinated people in certain spaces domestically. Some states (e.g., New York and Hawaii) have implemented vaccine passport programs that allow users to create vaccine credentials, which can be accessed and exhibited digitally through smartphones and internet browsers.

Is it legal to require COVID-19 vaccine passports or mandate the COVID-19 vaccine in the workplace?

Generally, a private employer may mandate COVID-19 vaccination or implement COVID-19 vaccine passport program for in-person work, unless prohibited by state or local law.

- There is no federal law specifically prohibiting employers from mandating COVID-19 vaccination in the workplace. In fact, the U.S. Equal Opportunity Commission (EEOC) has updated its technical assistance to specify that under federal EEO laws, employers may require all employees entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation, disparate impact, and disparate treatment considerations. Recently, a district court dismissed a lawsuit brought by hospital employees who were required to get vaccinated as a condition of continued employment. The court rejected the plaintiff's argument that the requirement violates the federal statute concerning the emergency use authorization (21 U.S.C. § 360bbb-3) and the federal regulation concerning informed consent for human subject (45 C.F.R. § 46.116); the court also said that the vaccination requirement was consistent with public policy.
- On the other hand, state and local laws may prohibit a workplace vaccination mandate. At least one state has passed a law specifically prohibiting employers from refusing to employ or discriminating against an individual based on his or her vaccination status or possession of a vaccine passport. Additionally, many states, including Michigan, have pending legislation prohibiting employer-mandated vaccination or discrimination based on vaccine status.

Employers deciding to impose a vaccine mandate or implement a vaccine passport program on their workforce should verify the status of state and local laws to ensure that their policies are compliant.

How can COVID-19 vaccine passports or employees' COVID-19 vaccination status be used to facilitate workplace reopening?

In reopening the workplace, an employer may consider utilizing COVID-19 vaccine passports or the COVID-19 vaccination status of employees:

- To demonstrate its commitment to health and safety measures and limit its potential liability
- To survey its workforce about vaccination status to make informed decisions about reopening, allowing in-person work and implementing other safety protocols
- To determine if workers must quarantine after being exposed to COVID-19 at work, and
- To allow more flexibility for workers who are fully vaccinated.

However, employers need to take into consideration the legal issues associated with such a policy (see below), as well as potential practical implications, including employees' negative reaction to policies that treat workers differently or conflicts among employees with different vaccination statuses.

What are the legal considerations for employers considering mandating COVID-19 vaccine or implementing a COVID passport system for in-person work?

Employers who implement a COVID-19 passport system or mandating COVID-19 vaccine for inperson work must:

Comply with local and state laws and orders pertaining to mandated vaccinations. Note that some states have made, or are in the process of making, vaccination status a protected category. Montana, for instance, has made vaccination status a protected class and has limited inquiries into vaccination status.

- Comply with federal, state and local employment opportunity and anti-discrimination laws.
- Know what they can and cannot ask about an employee's vaccination status. Asking employees to produce proof of COVID-19 vaccination is not considered a disability-related question that must be job-related and consistent with business necessity, but asking why a worker was not vaccinated could run afoul of discrimination laws. Additionally, there are restrictions on asking pre-vaccination screening questions when the vaccine is administered by the employer or its agent.
- Maintain the confidentiality of employees' vaccination information.

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- Provide reasonable accommodation for those who cannot be vaccinated due to disabilities or sincerely held religious beliefs.
 - Be cautious of disciplining or terminating employees for non-participation in or opposition to COVID-19 vaccine policy or passport systems.
 - Consider potential issues with workplace vaccination policies with a unionized workforce and under the National Labor Relations Act.
 - Be mindful of privacy and security issues related to a maintaining vaccination information and passport program.
 - Consider wage-and-hour and leave issues, such as for the time required for employees to be vaccinated and to manage potential vaccine side effects.
 - Be aware that Worker's Compensation laws may require employers to pay for vaccinerelated injuries if the employee is required by their employer to be vaccinated.

What are the legal considerations for employers offering COVID-19 vaccine incentives?

Employers wanting to offer incentives to increase employees COVID-19 vaccination rates should be aware of several legal issues:

- According to EEOC guidance, an employer may offer an incentive to employees to voluntarily provide confirmation that they or their family members received COVID-19 vaccine from a health care provider. However, there are limitations if an employer offers an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent. And, under GINA, an employer may not offer an incentive to an employee in return for an employee's family member getting vaccinated by the employer or its agent.
- Offering significant incentives for getting vaccinated (beyond compensating for time or reimbursing for expenses) creates potential exposure for discrimination and accommodation claims. For example, employees may allege disparate treatment if they cannot get the incentive or participate in company events because they have disabilities or a sincerely held religious belief for which they cannot get vaccinated. Additionally, an individual who cannot get vaccinated because of his or her disability or a sincerely held religious belief may be entitled to accommodation that entitles them to the same incentives as other employees.
- Wage-and-hour issues may arise with monetary incentives, which can be deemed as a non-discretionary bonus for the purpose of calculating overtime compensation.
- Potential liability exposure can arise under the Employee Retirement Income Security Act and the Health Insurance Portability and Accountability Act.

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