

The Legality and Creation of an Ethical COVID-19 Vaccination Passport in the United States of America

In just over fifteen months, the United States reached a grim milestone of six hundred thousand coronavirus-related deaths, with the world seeing over 181 million cases as of June 25, 2021.¹ Despite this, recent months have given Americans great reason for hope—the use of new vaccines against the virus has been shown to significantly slow the spread of the virus and may be a long-awaited indication of the closure of the pandemic.² With these breakthroughs, the Centers for Disease Control and Prevention (CDC) has issued new guidelines specifically pertaining to the fully-vaccinated population of America, including the resuming of pre-pandemic activities, travel without quarantine or testing, and no longer requiring mask-wearing in most environments.³ Because of this new, separate set of allowances for the vaccinated and the overarching desire to slow the spread of the coronavirus, the idea of vaccine passports, or certifications of vaccinations reducing restrictions on their bearers, have emerged as a method to tailor restrictions on an individual basis. However, despite the idea’s potential to limit the spread and slow the coronavirus, vaccine passports have raised several privacy concerns and while questioning whether vaccine passports can be conducted in accordance with federal and state privacy laws. On the federal level, a vaccine passport is legally possible without infringing on one’s right to privacy, especially when strict privacy protections are implemented.

¹ Scott Neuman, “The U.S. Has Hit 600,000 COVID Deaths, More Than Any Other Country,” NPR (NPR, June 15, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/06/15/1006186695/the-u-s-has-hit-600-000-covid-death-s-more-than-any-other-country>.<https://www.npr.org/sections/coronavirus-live-updates/2021/06/15/1006186695/the-u-s-has-hit-600-000-covid-deaths-more-than-any-other-country>; “Coronavirus Cases,” Worldometer, accessed June 25, 2021, https://www.worldometers.info/coronavirus/?utm_campaign=homeAdUOA%3FSi.

² Robbie Whelan and Jon Kamp, “Vaccines Appear to Be Slowing Spread of Covid-19 Infections,” The Wall Street Journal (Dow Jones & Company, April 28, 2021), <https://www.wsj.com/articles/vaccines-appear-to-be-slowing-spread-of-covid-19-infections-11619615436>.

³ “When You’ve Been Fully Vaccinated,” Centers for Disease Control and Prevention (Centers for Disease Control and Prevention), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html>.

Federal Law and Vaccine Passports

The majority of federal laws surrounding medical information distribution, such as the Privacy Act of 1974, which regulates the transmission of health data, and the Freedom of Information Act, which excludes select medical information from its disclosure requirements, specifically target government-held data and thus would not apply to a vaccine passport operated by a private-sector company, such as IBM's Excelsior Pass in the state of New York or on privately-owned businesses.⁴

Most often cited in concerns of vaccine passports are the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act, the Fourth Amendment, and the Americans With Disabilities Act (ADA). HIPAA, according to the Health Information Privacy's official websites, requires entities to "reasonably limit uses and disclosures [of medical information without patient consent] to the minimum necessary to accomplish their intended purpose," which could pose a potential legal challenge for such a passport; however, similar to the Privacy Act of 1974 and the Freedom of Information Act, so long as the operator of the passport does not fall under HIPAA's covered entities—health plans, health care providers, or health care clearinghouses—a vaccination passport would not illegal under HIPAA.⁵ In addition, since private businesses are not covered entities under HIPAA, requiring proof of vaccination for entry is not a violation of HIPAA. Considering the Biden administration's opposition against a federal mandated vaccine passport, choosing to download (for virtual

⁴ James G. Hodge, Jr, Lawrence O. Gostin, and Peter D. Jacobson, "Legal Issues Concerning Electronic Health Information," JAMA 282, no. 15 (1999): p. 1466, <https://doi.org/10.1001/jama.282.15.1466>; "Governor Cuomo Announces Launch of Excelsior Pass to Help Fast-Track Reopening of Businesses and Entertainment Venues Statewide," New York State, March 26, 2021, <https://www.governor.ny.gov/news/governor-cuomo-announces-launch-excelsior-pass-help-fast-track-reopening-businesses-and>.

⁵ "Your Rights Under HIPAA," Health Information Privacy (US Department of Health and Human Services, November 2, 2020), <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html>; James G. Hodge, Jr, et al, "Legal Issues," p. 1468

passports) and complete a vaccination passport implies that the bearer gives their consent for the use of their vaccination status (in the scope of the passport), thus taking vaccine status information collected by vaccine passports out of HIPAA's jurisdiction, since HIPAA targets the unconsented use of medical information.⁶

The Equal Employment Opportunity Commission (EEOC) previously announced that it would allow employers to require coronavirus vaccination of their employees, as such a requirement is not a violation of Genetic Information Nondiscrimination Act or the ADA, with the latter's scope only extending to employment, so long as religious and medical exemptions are taken into account and such an inquiry does not involve the use, acquisition, or distribution of the information, however, the question of whether businesses are allowed to require proof of vaccination remains.⁷

Though businesses cannot legally search a customer—such as reaching into their pockets in search of a vaccine passport—it is well within their means to require customers to show proof of vaccination for entry as long as they do not violate statutory or constitutional provisions of the law, such as using it as a means to discriminate on other bases, a violation of the 14th Amendment, which guarantee all citizens equal protection under the law.⁸ In addition, for public entities, *Jacobson v. Massachusetts* in 1905 established the precedent that it was legal for government entities to enforce mandatory vaccinations in the interest of public health, with Justice John Marshall Harlan writing in the majority opinion, “A community has the right to protect itself against an epidemic of disease which threatens the safety of its members”.⁹ Asking

⁶ “Covid: US Rules out Federal Vaccine Passports,” BBC News (BBC, April 6, 2021), <https://www.bbc.com/news/world-us-canada-56657194>; Marcella Slay, “COVID-19 Vaccine Passports and Privacy Concerns,” Loyola University Chicago School of Law, April 22, 2021, <http://blogs.luc.edu/compliance/?p=3956>.

⁷ “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” U.S. Equal Employment Opportunity Commission, 2021, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

⁸ U.S. Const. amend. XIV, § 1

⁹ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

for proof of vaccination does not constitute a search or seizure and since businesses are not government entities, mandating proof of vaccination, as in a vaccine passport, would not be a violation of the Fourth Amendment, which outlaws unwarranted government searches and seizures.¹⁰

Historical Examples of Compulsory Vaccinations and Vaccine Passports

At the turn of the twentieth century, the United States was battling a deadly smallpox epidemic. Vaccination certificates were first necessary to gain access to many facilities; however, because of an influx of fraudulent certificates, crowded cities where transmission of the disease occurred at a fast rate and other areas with smallpox breakouts required showing of scars for entry to public transport, schools, factories, immigrant ships, and more, with one prominent physician, Dr. James Hyde, writing, “Vaccination should be the seal on the passport of entrance to the public schools, to the voters’ booth, to the box of the juryman, and to every position of duty, privilege, profit or honor in the gift of either the State or the Nation”.¹¹

Since the early twentieth century, new laws and legislation have been introduced to enforce the privacy of medical information; however, as previously outlined, no federal law outlaws the concept of vaccine passports and neither do they outlaw businesses requiring proof of vaccination. On the state level, however, this can be changed: sixteen states have issued bans or restrictions on vaccine passports, and thus would not prove feasible in these states.¹²

¹⁰ Sasha Hupka, “No, It Is Not Illegal For Businesses To Require Proof Of Vaccination,” CapRadio, May 25, 2021, <https://www.capradio.org/articles/2021/05/25/no-it-is-not-illegal-for-businesses-to-require-proof-of-vaccination/>.

¹¹ “Vaccination Certificate Frauds,” *The New York Times*, May 9, 1904; James Nevins Hyde, “The Late Epidemic of Smallpox,” *The Popular Science Monthly* 59 (August 1901).

¹² Greg Heilman, “Which States Are Banning Vaccine Passports and Why?,” AS.com (AS En, June 3, 2021), https://en.as.com/en/2021/06/03/latest_news/1622756193_791208.html.

Creating a Vaccine Passport Balancing Individuals' Right to Privacy and Public Health

While vaccine passports are legal under federal law, ultimately, like any piece of medical information, it is key that vaccine passports are handled with the highest standards of privacy and transparency. Generally, data collection has four steps, beginning with data collection, data manipulation by machine, disclosure to a person inside the program, and finally public disclosure.¹³ Because the only necessary piece of information for a vaccine passport would be proof of vaccination, data collection must be limited to proof of vaccination and essential information, in the event improper usage or distribution of data occurs.

Companies operating a vaccine passport must be as transparent with their processes regarding the handling of vaccination information. In a joint opinion released by the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS), two of the most prominent points emphasised were a need of clear identification of controllers and processors and that processes are “clearly outlined for citizens to able to exercise their data protection rights.”¹⁴ Vaccine passports for the United States should operate under similar standards, as the handling of medical information must be transparent so users can make their best, informed decision on whether or not to use a vaccine passport.

Disclosure to a person inside a vaccine passport program could be seen in the forms of seeking verification with health providers—considering the ease of forgery for vaccination cards—but to maintain a proper and stringent level of privacy protections for individuals, corporations, if data sharing, should have legal basis to do so, similar to practices in the

¹³ Orins S. Kerr, “Use Restrictions and the Future of Surveillance Law,” in *Constitution 3.0: Freedom and Technological Change* (Brookings Institution Pr, 2013), pp. 37-46.

¹⁴ European Data Protection Board and European Data Protection Supervisor, “EDPB-EDPS Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a Framework for the Issuance, Verification and Acceptance of Interoperable Certificates on Vaccination, Testing and Recovery to Facilitate Free Movement during the COVID-19 Pandemic (Digital Green Certificate),” March 31, 2021.

European Union.¹⁵ By imposing such a requirement, third-party access to this confidential medical information can be limited to the smallest extent possible, protecting the sharing of medical information. In addition, extra layers of security through new and existing security infrastructure must be implemented for the protection of medical information.

Despite electronic health records' growth in recent years, protection solutions have lagged behind; according to the Department of Health and Human Services, at least 3,054 healthcare data infringements occurred from 2009 to 2019.¹⁶ Should a corporation choose to develop a vaccine passport, security must be a top priority, with proposed solutions, such as blockchain application, edge nodes, and multilevel authentication, all being possible measures to be implemented for the security of a vaccine passport.¹⁷

Unlike other operations, such as surveillance, vaccine passports would not require public disclosure, as their use would be on an individual, private basis. However, should vaccine information be publicly disclosed—which would be a breach of users' and the public's trust—legitimate and impactful penalties should be established in order to deter and to prevent such a leakage. Citizens should have the right to expect their vaccination passports to be useful, secure, and, most of all, private. Vaccination passports, with current federal law, are a viable tool that, if implemented, can prove to be effective tools at protecting public health while respecting individuals' rights to privacy.

¹⁵ Chris Bowen, "The Need for Privacy in Vaccine Passport Policies," MedCity News, May 3, 2021, <https://medcitynews.com/2021/05/the-need-for-privacy-in-vaccine-passport-policies/>.

¹⁶ Trisha Torrey, "How Private Are Your Medical Records?," Verywell Health, n.d., <https://www.verywellhealth.com/who-has-access-to-your-medical-records-2615502>.

¹⁷ Kelvin K Tsoi et al., "The Way Forward after COVID-19 Vaccination: Vaccine Passports with Blockchain to Protect Personal Privacy," *BMJ Innovations* 7, no. 2 (April 7, 2021): pp. 337-341, <https://doi.org/10.1136/bmjinnov-2021-000661>.

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U.S. Const. amend. XIV, § 1.

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