



April 12, 2021

Vaccine Passports

A few nights ago, I had dinner in a friend's backyard here in Scottsdale, Arizona. There were about 10 of us. It was a nice night outside. No one wore masks, and we didn't make any particular effort to maintain six feet between us. We were all fully vaccinated, as our hosts knew before they invited us. It reminded me what the company of other humans used to feel like before I learned that I could die or kill someone just by leaving my own cocoon. It was nice. I look forward to hanging out with vaccinated friends again.

Some event organizers and public accommodations are already counting on people feeling the way I did. On April 1, the [NBA's Miami Heat](#) opened two sections in their lower bowl only for fully vaccinated fans. Pods are be separated by just one seat, and fans are admitted through a separate gate and required to show their CDC vaccination card or other proof of vaccination, along with valid identification. In New York, [Madison Square Garden](#) has begun using the state's [Excelsior Pass](#) digital passport to allow state residents to prove their vaccination status. [Northeastern University in Boston and Brown University in Providence](#) announced this week that they will require students to be vaccinated before they return to campus for the fall semester. [Walmart](#), the nation's largest private employer, is offering electronic verification apps to patients vaccinated in its stores so they "can easily access their vaccine status as needed."

Given the recent politicization of science in the U.S., it was predictable that some state leaders would push back. Among the usual suspects, [Florida](#) precludes any "government entity, or its subdivisions, agents, or assigns" from issuing a vaccine passport and purports to prohibit "[b]usinesses in Florida ... from requiring patrons or customers to provide any documentation certifying COVID-19 vaccination or post-transmission recovery to gain access to, entry upon, or service from the business." [Texas](#) just issued an executive order preventing private entities that receive state funds from requiring proof of vaccination.

Can a state legally regulate private activity this way? Should they?

Let's unpack these questions. First, a lawyerly caveat. Florida's Executive Order regulates public health, which is generally within a governor's authority. Florida businesses such as the Heat and the [South Beach Wine & Food Festival](#) have already expressed their intention to require proof of vaccination, which is generally within their authority as the operators of private property. The positions do not peacefully co-exist. Options to resolve the conflict include one side backing down, the parties quietly negotiating a middle ground to avoid a public confrontation, or everyone lawyering up and taking this to court. We will see soon enough.

A. Legal Rights of States Versus Venue Operators

Regarding the rights of the state versus private businesses, let's discuss what we already know.

- 1) **Can a government entity require its residents to get vaccinated?** Yes. School boards and the American military have long required students and soldiers to be vaccinated against various diseases, which they are allowed to do by a 1905 U.S. Supreme Court case, *Jacobson v. Massachusetts*. Faithful readers will recall that I wrote about this last September in [Vaccines: Liberty Regulated by Law](#).
- 2) **Can a private business or school condition access or employment on vaccination?** Yes. Private companies may legally refuse to employ or do business with whomever they want, subject to only a few exceptions that do not include vaccination status. This was most recently affirmed on September 8, 2020 in updated guidance from the [Equal Employment Opportunity Commission](#):

[E]mployers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others.

This is the reason you can require workers to cover their tattoos or pull back their hair, or refuse to admit guests carrying lasers. ("No shoes, no shirt, no service" is quite legal.) So long as you do not discriminate against someone based on their membership in a legally protected class (e.g., race, sex, religion, age, disability), you can make these determinations as you wish.

- 3) **Can a state override private property rights by enacting laws barring discrimination based on vaccination status?** Maybe. In Florida, the governor's Order relies on powers he claims under that state's Emergency Management Act.

The Act gives him considerable discretion to address disasters, including authority to suspend existing state rules and statutes. In this case, however, the Order seeks to suspend a basic property right. Because American law considers the rights of private property owners and operators to be very important, a state usually must explain specifically why behavior at an individual property poses a threat to the public welfare. The Florida law will be tested in the Florida state court system, so that offers a hint how this conflict might be resolved.

B. Are Vaccine Passports a Good Idea?

To use the correct answer to every legal question, “It depends.”

It depends on who you ask. [Critics of vaccine passports](#) worry about Big Brother, claiming that centralized databases of vaccinated people are government intrusion on privacy. Although I’m as skeptical of big institutions as the next person, this particular concern seems overblown to me. [Every state already has a vaccination database](#), called an “immunization registry,” and under “data use agreements,” states must share their registries with CDC (which then anonymizes the information, although not all states provide it).

[Private sector businesses](#) worried about getting sued by workers or guests who claim they got infected at that venue figure that since they have a legal duty to provide reasonably safe accommodations, they should be allowed to mitigate the risk of infection using all the tools at their disposal. The concern about personal injury lawsuits is overblown (I’ve written and spoken about that a lot), but businesses’ desire to defend themselves seems legitimate to me.

Many event professionals looking for economically-viable attendance levels will welcome vaccine passports as a way to safely fill more seats closer together. That should be obvious to every *Adelman on Venues* reader eagerly looking forward to a full paycheck for the first time in more than a year.

Health equity, certainly a [global concern](#) given the absence of vaccines in many countries, arguably resonates differently in the United States. Although access to health care is a national concern important enough to comprise a [132 page CDC practitioner’s guide](#), coronavirus vaccine access should be less of an issue as we approach the date next week when every American 16 years and older can schedule a vaccination.

None of this is resolved as of today. Stay tuned to your local news for daily updates.

Conversations About Reopening

My days are filled with talk about reopening.

- When can we welcome guests again?
- Can we host enough people to make it economically viable?
- What health and safety accommodations will be necessary?
- What should the rules be?
- How can we enforce the rules?
- How do we navigate between local mandates and CDC guidance?
- Does the law impose any barriers, or help with any of our challenges?

Over the last month, I have addressed myriad issues related to reopening live events. Here is a multi-media sample for your viewing, reading, or listening enjoyment.

COVID Compliance Officer training. I am a certified COVID compliance guy, meaning that I have a certificate. That does not, however, mean I know how to enforce reasonable practices. I learned that on the job and through friends who taught me about medicine and testing. Here is a panel I moderated, [Why Most COVID Compliance Officer Training Sucks, and What Would Be Better](#)

Contract Cancellation Language. For many years, I resisted talking about standard contract terms, figuring that this is how I earn my living. Then I realized that when Penn Jillette explains a magic trick, viewers still can't do it themselves, but they're more impressed than before at the few experts who can. Watch me pull back the curtain.

[Breaking Up is Hard to Do: Contract Language About Cancellation](#)

Crowd Management. This is an article how creating a new safety organization is like designing a logo. Hint: if this were entirely backwards-looking, it wouldn't be very interesting, would it? [A Thicket of Letters: A Parable About Crowd Management](#)

Weddings Are Events Too. I moderated an international conversation about the comparative challenges event planners face these days trying to hold weddings in the U.S. versus South Africa for a virtual wedding planner conference. [Safety Measures at Weddings](#)

NPR Morning Edition. I had a great half-hour discussion with the Arts correspondent for NPR Morning Edition, which I think is nerd cool. Most of it got left on the cutting room floor, but it was still fun to get messages from people who heard me on their radios at home. [Are You Ready to Rock? Music Festivals Prepare for a 2021 Comeback](#)

Be safe out there. There's a lot going on these days. Steve Adelman