

# Vaccine Passport Efforts Need To Stay Mindful Of ADA Title III

By **Charles Thompson and Anthony Guzman**

While much ink has been spilled answering questions about employers requiring or not requiring proof of vaccination status and the consequences for employees failing to do so, one question has received significantly less attention — what about Title III of the Americans with Disabilities Act?

As both lockdowns and mask litigation continue, a new novel Title III concern emerged — vaccine passports. Here, vaccine passport is a new term that refers to proof of vaccination status. The so-called passport also may be the requirement to show your Centers for Disease Control and Prevention vaccination card.

As with the mask mandate litigation that arose earlier in the pandemic, vaccine passports raise both significant and novel questions regarding whether requiring them of customers and patrons creates legitimate impediments to the full and equal access of public accommodations by individuals with certain disabilities.

As a result, companies should take note to understand the purview of Title III of the ADA, how COVID-19 gives rise to novel questions, and what those questions can teach us about the prospective viability of vaccine passports under Title III moving forward.



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## **Title III**

Title III of the ADA prohibits public accommodations from depriving, or acting in a manner that deprives, disabled individuals of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" such places offer. "Place[s] of public accommodation" run the gamut, from retail stores, to hotels, theaters, doctor's offices and other areas generally open to the public.

In this area of the law, discrimination often presents itself as a product of oversight rather than animus. A company may have accidentally made an access ramp slightly too steep or a grocery aisle slightly too narrow — all despite good intentions. And though Title III only provides for injunctive relief, compliance costs can be far from negligible to organizational budgets.

The respective burdens of proof for Title III claims are simple. The individuals bear the burden of proving their requested accommodations are both reasonable and necessary, while the organizations bear the burden of proving any proposed accommodations would fundamentally alter the nature of the programs.

Defenses are also available, including where "the individual poses a direct threat to the health or safety of others," provided the threat cannot be eliminated through modifying policies or other accommodations.

## **COVID-19 Pandemic And Novel Issues**

COVID-19 brought a host of new issues under Title III. Informed by multiple and rapidly changing lockdown orders, many organizations suddenly found themselves having to implement new policies and procedures, ranging from mask mandates, social distancing protocols, plexiglass divider installations and more.

As a result, while Title III lawsuit filings initially fell during March and April 2020, by August 2020 monthly filings outpaced the year's pre-pandemic filing numbers due to a flood of new issues precipitated by pandemic conditions.

Out of these new filings, Title III litigation related to mask mandates emerged as a new phenomenon. With most organizations requiring patrons to wear masks to access their public accommodations, individuals and astute attorneys quickly identified instances in which these policies disproportionately impacted disability communities —often citing a range of different theories.

Take, for example, *Bunn v. Nike Inc.* In July 2020, customer Cali Bunn alleged in the U.S. District Court for the Northern District of California that mask mandates prevented patrons who were deaf and hearing-impaired, like herself, from being able effectively communicate with others by reading their lips.

Unsurprisingly, this unique theory ultimately resulted in a classwide settlement that, in relevant part, had the company agree to provide its employees with both transparent masks and readily accessible notepads.

Ultimately, the message was clear — although some of the emerging Title III theories appeared frivolous, others raised legitimate concerns.

### **Viability of Vaccine Passports Under Title III**

The concept behind vaccine passports is simple. Terminology aside, vaccine passports refer to a form of proof of status, as a way for organizations to verify whether an individual has received the vaccine, whether through a vaccination card, an electronic app or other mechanism.

As with mask mandates, organizations are requiring patrons to demonstrate they are vaccinated to access their public accommodations. As consideration of passports continues in the wake of virulent political debate and litigation, questions regarding their viability under Title III continue to grow and go unanswered. For example:

#### ***Impact of Mask Litigation***

We see arguments being made that masks are enough. In essence, some may argue that if masks worked before, why would those with disability-based objections not be able to rely on their use as a viable alternative now? A new round of litigation will be required to get the courts' response.

The Delta variant has changed the game as even vaccinated individuals can be infected and a booster dose of vaccine seems to be the next step for many, as recommended by the CDC and others.

#### ***Impact of Rising Vaccinated Population***

The rising numbers of vaccinated individuals could make it difficult for employers to claim

individuals with COVID-19 present "a direct threat to the health or safety of others" that cannot be otherwise eliminated through modifying policies, yet with the unknown pathology of the Delta variant, vaccination may not be enough.

Although the U.S. Equal Employment Opportunity Commission has indicated employers can likely avail themselves of Title III's direct threat exception, some will argue that logic deteriorates as vaccination rates rise.

However, on the flip side, some states and localities are proactively requiring vaccination for access to and participation in certain events/activities. For instance in New York City, it was put into effect on Aug. 17 that a vaccine passport would be necessary in indoor public places such as gyms and restaurants. San Francisco, Los Angeles and sports teams are among the other entities requiring a vaccine for attendance at events.

### ***Impact of Administrative Difficulties***

The administrative difficulties of verifying the legitimacy of a claimed disability may cause the exception to subsume the rule altogether.

Many prior state orders expressly prohibit organizations from asking patrons for documentation or, in some cases, about the nature of the disability or medical condition, upon which the exception to the becoming vaccinated and having proof of it flows.

Absent verification mechanisms, unprotected groups could avail themselves of the Title III exception simply by claiming they fall within its umbrella. This challenges vaccine passport policies as a practical matter.

Although frustrating to some, prohibiting on-site disability verification is grounded in sound policy. This can be seen through the ADA Amendments Act of 2008 — which was passed to stymie the wave of ADA litigation that, through a series of court rulings, had come to see a large portion of cases turn on whether an individual's ailment was a disability, rather than whether discrimination actually occurred.

As Congress recognized, focusing on the disability, rather than the discrimination, missed the act's purpose. Similarly, it stands to reason that turning private organizations into arbiters of what constitutes a disability, or whether a disability truly prevents someone from receiving a vaccine, may undermine — or at least unduly burden— the very protections the ADA seeks to offer disabled populations.

Again, however, whether courts are receptive to these arguments, or their prospective impacts, remains to be seen.

### **Key Takeaways**

In some locales, vaccine passports are already here. In others, states have passed laws forbidding them. And in yet others, they remain under consideration. Whatever the circumstance though, moving forward, we cannot ignore the broader impacts of vaccine mandates on disabled communities.

Disability communities have faced systemic discrimination throughout history, often motivated by the economics or administrative hassle associated with providing their entitled accommodations.

Few dispute this. However, when faced with a historic pandemic and novel problems that touch upon the vast majority of the population, for many, this systemic exclusion may often fall to the analytic wayside. Though consideration of this problem complicates the assessment, the problem is one that must be faced head on, with an eye toward mindful policies.

Accepting undesirable, but nonetheless intentional, consequences of those mindful policies is part of that goal. Employers may have to incur greater expense analyzing and administering vaccine policies.

Patrons may lie about disabilities and slip through the cracks. These things may happen. But no policy is perfect and, at least in some cases, trade-offs may be unavoidable.

With these broader impacts in mind, organizations may want to keep a few general points in mind regarding vaccine passports when implementing or revising their own policies.

1. Document the reasons for implementing the policy, whether it be local government order, guidance from regulatory agencies, or general patron safety concerns.
2. Explore whether alternatives exist for individuals who claim preventative disabilities. Could the individual access the services online, be provided with a remote shopper while they wait at the front, or wear a mask? Whatever the case, the company should be sure to document the alternatives considered, made available, or why alternatives may not exist.
3. Train employees on the policy, including how to avoid intrusive questions and how to explain alternatives available, if any. Ultimately, employees serve as the front-line policy enforcers, with failures on their part often implicating broader company liability. As a result, well-documented training, including proof of presentation to staff, can be critical for defensive strategies.

In each case though, companies should analyze the prospective Title III concerns unique to their own organization and business strategy. What may work for a retail outlet, may not work for a restaurant.

Regardless, as discussions surrounding vaccine passports continue to permeate the social ether, companies would be wise to keep abreast of announced guidance from key regulatory agencies, such as the EEOC and CDC.

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