

# Do State Bans on Vaccine Passports Impact Employer Policies?

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Officials in some states are blocking businesses and government agencies from requiring people to produce vaccine passports—documentation that they've been vaccinated against COVID-19. But in most states, private employers can continue to ask whether workers are vaccinated, and employers in some locations may be obligated to do so.

When employers and workers see headlines about states with vaccine passport bans, they should understand that these directives are a lot more nuanced than a simple headline may convey, said Brett Coburn, an attorney with Alston & Bird in Atlanta.

Brooke Schneider, an attorney with Withers in New York City, explained that while some states are banning vaccine passports in some situations, many are still allowing employers to ask their employees whether or not they have received a COVID-19 vaccine.

Schneider noted that asking employees whether or not they have received a vaccine is different than requiring a vaccine passport. "Inquiring about vaccination status will ultimately enable employers to better create or revise their return-to-work policies with an aim toward providing sufficient health and safety protections without being overly restrictive."

Still, navigating different and sometime conflicting state and local laws is tricky. Employers will continue to face enormous challenges as they relax their COVID-19 safety policies and reopen their worksites, said Dane Steffenson, an attorney with Littler in Atlanta. "Workers read about lifted restrictions and may not understand that the guidelines might not apply to the workplace," he said.

Employers should continue to look to the Occupational Safety and Health Administration (OSHA) ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/What-Employers-Need-to-Know-about-OSHA-COVID-19-Updates.aspx](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/What-Employers-Need-to-Know-about-OSHA-COVID-19-Updates.aspx)) and state and local laws that specifically address the workplace. "Ultimately, it is probably best for employers to follow the most restrictive guidance from their local or federal sources," Schneider said, and they can modify their policies as conditions continue to improve.

## Vaccine Passport Bans Explained

## FEATURED RESOURCE HUB PAGE



## COVID-19 Vaccination Resources

([www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx](http://www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx))

Feedback

State legislation and executive orders regulating vaccine passports generally prohibit state institutions from requiring proof of vaccination before people can access state offices or receive services from the state, said Mini Kapoor, an attorney with Haynes and Boone in Houston. However, she said, the orders vary in how they restrict private businesses. Business restrictions may fall into three categories:

- Complete ban on requiring vaccine passports.
- Restrictions based on whether a private business receives public funds.
- No restrictions for private businesses.

Montana's law is the most restrictive for employers. Gov. Greg Gianforte signed a bill into law ([www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/montana-limits-inquiries-into-immunization-status.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/montana-limits-inquiries-into-immunization-status.aspx)) on May 7 making vaccination status a protected category. With some exceptions for health care providers, Montana employers are prohibited from discriminating against employees and job applicants based on their vaccination status. Additionally, employers in the state cannot require employees to receive vaccines that have only emergency use authorization from the U.S. Food and Drug Administration or vaccines that are undergoing safety trials.

Florida's law also applies to private businesses, but not in the employment context. Gov. Ron DeSantis issued an executive order (<https://www.littler.com/publication-press/publication/businesses-sunshine-state-are-prohibited-requiring-vaccine-passport>) and subsequently signed a bill that takes effect July 1 (<https://www.fisherphillips.com/news-insights/florida-employers-vaccine-passport-ban-mask-requirements.html>) banning business in the state from requiring customers to prove that they've received a COVID-19 vaccination before receiving services. The Florida law also has exceptions for health care providers. Notably, Florida's law applies to "patrons or customers" and does not mention "employees."

"Florida's law has received a ton of press," Coburn observed. "It does apply to private businesses but doesn't purport to apply to employment."

In some states, executive orders apply only to government agencies. Other state orders apply to private businesses only if they receive public funding or state-contracted services, Kapoor noted.

"On the flipside," Coburn said, some states, such as Oregon, actually require businesses to inquire about vaccination status before relaxing mask requirements.

Oregon Gov. Kate Brown said she will lift business occupancy limits and mask mandates—regardless of vaccination status—in many public places when 70 percent of adults in the state have received at least one dose of a COVID-19 vaccination.

In California, Santa Clara County requires businesses and governmental entities to ascertain the vaccination status ([www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-county-requires-employers-to-ascertain-vaccination-status.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-county-requires-employers-to-ascertain-vaccination-status.aspx)) of all employees.

### Interaction with Other Laws

Do state vaccine-passport bans conflict with OSHA rules and other workplace safety requirements and guidelines? Probably not.

"The primary focus of passport ban laws is to address the customer relationship when patronizing a business," said Matthew Deffebach, an attorney with Haynes and Boone in Houston.

"Even if some of these laws could be interpreted to sweep more broadly as to prevent employers from requiring vaccine passports in their private-sector workplaces, OSHA has not taken a position on whether an inquiry as to proof of vaccine status is required for worker safety."

Therefore, he said, there is no conflict with OSHA COVID-19 guidance and limitations on the use of vaccine passports. He noted that the U.S. Equal Employment Opportunity Commission has made it clear that, subject to certain conditions, a private-sector employer can ask about the vaccination status ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/takeaways-from-eeoc-latest-guidance-on-covid-19-vaccines.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/takeaways-from-eeoc-latest-guidance-on-covid-19-vaccines.aspx)) of its employees.

"These vaccine passport ban laws should not interfere with a private-sector employer's ability to simply inquire as to the vaccine status of its employees," he said.

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