

CGA Symposium

Coffee with Counsel Agenda A. 3.

Can a grocery store require proof of vaccine for customers who wish to shop without a mask?

Background (Legislative Approach)

In an attempt to solve this issue outright, some states have issued legislation or mandates by the Governor to either bar or permit businesses from requesting proof of vaccination in order to enter a store without a mask. (e.g., AZ Governor issued an Executive Order saying that state and local governments and businesses that contract with the state to provide services to the public cannot require proof of COVID vaccination.)

Governor Newsom has not done this and shows no intention to do so. Health and Human Services Secretary Mark Ghaly announce that when California lifts its social distancing requirements and capacity limits on June 15, the State will not require official vaccine passports. This is notably in contrast to states like New York, which partnered with IBM to create a state vaccine passport app called Excelsior Pass.

Ghaly has noted, though, that businesses may continue to require masks for the health and safety of their own patrons and employees if they choose. Counties and local health departments are also able to impose their own stricter requirements.

On the other hand, CA State Representative Kevin Kiley has proposed AB 327, which would prohibit any public or private entity that receives or is awarded state funds from requiring a member of the public to provide proof of vaccination to enter into a store without a mask. This bill is unlikely to garner enough support within the State Legislature.

Hence, store owners are left at square one with a Catch-22: if you want to allow vaccinated patrons to shop without a mask, you may or may not legally request proof of vaccination.

HIPAA Violation

Some have argued that requesting proof of vaccination is a violation of healthcare privacy protections under Health Insurance Portability and Accountability Act (HIPAA). However, HIPAA health care privacy laws apply to the medical industry, not restaurants and businesses, which are not considered “covered entities” under HIPAA. Thus, HIPAA does not prohibit a store from asking about vaccination status. That said, the question of whether a store may request to see a copy of (or the actual) vaccination card of a patron may pose a separate issue. Is the patron voluntarily disclosing this information or not? If it is viewed to be voluntarily, then it likely would not be a violation of HIPAA.

ADA and Unruh Exceptions

There seems to be nothing necessarily illegal about requesting proof of vaccination to enter the premises of a business because this action does not violate health privacy laws. However, asking *and requiring* certain protected classes to be vaccinated in order to enter a public space may constitute illegal discrimination of a protected class of people as defined by the Americans with Disabilities Act (ADA) and the Unruh Civil Rights Act (Unruh). Protected classes include those based upon sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation. Thus, if one is unable to receive a vaccination or wear a mask due to a medical condition, for example, the store may need to provide necessary accommodations. A store may simply request proof of vaccination or proof of a covered exception.

Current Practices and Options for Checking Vaccination Status

Aside from these exceptions, businesses generally have leeway to refuse service to patrons. Harvard Law professor Mark Tushnet likens the request for proof of vaccination to the notion of “No shoes, no shirt, no service.”

<https://www.nytimes.com/2021/04/06/us/politics/vaccine-passports-coronavirus.html>

Some large venues in California have forged ahead by implemented procedures to check the vaccine status of customers before allowing them to enter. The San Francisco Giants have utilized a mobile application called the Clear Health Pass by clearme.com to vet patrons prior to allowing them into the stadium. The app is free for the customer but not the venues that choose to use it. With the Clear Health Pass, patrons can directly upload their vaccine or COVID-19 test information to their Clear Health profile. They would then scan their phone app upon entry to the store to show proof of vaccination.

Conclusion

Ultimately, it seems that businesses are within their rights to request customers to show proof of vaccination if they wish to shop without wearing a mask as long as the business is not specifically discriminating against a protected class. This means that business would need to allow for exceptions for patrons who are unable to wear a mask for reasons protected by the ADA. However, there is still significant uncertainty on this matter and the ultimate answer to this question will likely come from a court after litigation occurs. For that reason, businesses may likely opt to maintain a mask policy despite the new state recommendations that are coming June 15th. Businesses should also closely monitor the orders issued by their local city and county health officials since federal and state laws may be augmented by local requirements.