

## As CDC Eases Travel Guidance, Are 'Vaccine Passports' Next?

By **Linda Chiem**

*Law360 (April 2, 2021, 8:20 PM EDT)* -- With the Centers for Disease Control and Prevention's Friday announcement that fully vaccinated individuals can again travel in the U.S. without COVID-19 testing beforehand or self-quarantining afterward, attention now turns to whether businesses and state and local governments will embrace so-called vaccine passports.

In light of recent evidence that the vaccines are effective at reducing novel coronavirus infections, the CDC has determined that traveling is a low-risk activity for fully vaccinated individuals. But the agency cautioned that its existing recommendations — including wearing face coverings, staying six feet away from other people, avoiding crowds and washing hands or using hand sanitizer frequently — should still be followed while traveling.

The CDC's updated guidance is welcome news for transportation providers and airlines, many of which have sought additional federal guidance to restore confidence in travel as governments ease stay-at-home mandates and business restrictions and accelerate vaccination efforts nationwide. With that guidance in the bag, airlines and travel groups may next focus their energy on building momentum for vaccine passports or other credentials showing proof of vaccination status, experts say.

Some airports and airlines in recent weeks have been experimenting with apps and other digital health passports, including the International Air Transport Association's IATA Travel Pass, and states like New York are testing digital proof-of-vaccination or proof-of-negative-test passes to attend theaters, events at major stadiums and arenas, wedding receptions and other large gatherings.

"Efforts by airlines and governments to use programs and laws to create a safer onboard environment and experience during the pandemic are well-intended and may be critical in helping the industry recover," said Roy Goldberg, an aviation litigation partner at Stinson LLP. "But to move to the next step and eventually return the airline industry to pre-pandemic levels, it remains crucial that vast swaths of the public feel safe to travel by air. Both the Federal Aviation Administration face mask mandate and the proposals of an IATA Travel Pass are designed to raise the public's comfort level with airline travel."

The digital health and vaccine passports are voluntary, and only a few U.S. carriers, including United Airlines and JetBlue, have launched programs using them. While it's unlikely that domestic airlines will implement hard-line travel passport protocols, they may benefit if foreign carriers do so, according to Goldberg.

"Beyond that, I believe that the domestic airlines have demonstrated that smart, science-based

approaches have worked very well during the pandemic," he said. "Even before vaccinations, the evidence seemed solid that airline travel with appropriate masks and mask compliance was extremely safe, and the CDC recognizes that the vaccinations have made air travel even safer, provided that masks are worn for the time being."

Friday's CDC guidance doesn't address the vaccine passport issue, including the question of what sort of proof travelers may have to produce in order to board airlines, trains, buses and other common carriers. But it at least can help state and local governments navigating complex recovery efforts adjust their policies or mandates pertaining to vaccinated travelers, according to Thomas P. Gies, a labor and employment litigation partner with Crowell & Moring LLP.

"Although it doesn't directly impact existing state laws imposing various sorts of travel restrictions, we believe state and local governments will begin to revise their restrictions in light of today's guidance," Gies said. "And perhaps most importantly, in the near term, it doesn't modify CDC's admonition against travel by people who aren't fully vaccinated. It's basically an honor system for people who are fully vaccinated."

Experts say digital health or COVID-19 vaccine passports also bring with them numerous implementation and compliance concerns for transportation companies and the broader business community.

While the Biden administration has committed to making vaccines available to all adult Americans by the summer, it has stated that there will be no federal mandate requiring that Americans get vaccinated. And in recent days, the administration has said that the private sector will take the lead on developing the so-called vaccine passports, but signaled that the federal government may offer guidelines on potential standardized proof-of-vaccine credentials.

"The federal government probably will not compel vaccination — they don't want it to be viewed as a government top-down mandate," Gies said. "And that's because there are substantial privacy and civil liberty issues raised by people on both the left and the right."

"As with the notion of a 'national mask mandate' last year, there are substantial questions whether the president, unlike Congress, has that authority under the Constitution," Gies added. "This is a fascinating legal issue that has informed many of the decisions made by both [former] President Donald Trump and now President Joe Biden during the pandemic."

At least one top-of-mind concern is data security and privacy: how individuals' health data is stored and the potential for breach and fraud, according to Faegre Drinker Biddle & Reath LLP employment attorney Alexa Miller.

In the case of the IATA Travel Pass, which is in the midst of a trial run with at least 22 foreign carriers, passengers' verified test or vaccination results are stored on the mobile device of the traveler, and the traveler fully controls what information is shared from their phone with airlines and authorities. The international aviation group says there is no central database or data repository for storing the information and that the IATA Travel Pass is also built on the highest standards of data protection laws, including the European Union's General Data Protection Regulation.

Stinson's Goldberg said a system where passengers provide personal medical information in exchange for airline access could bring with it legal challenges.

"Nobody wants to accidentally slip into 'Big Brother'/'1984' territory, and precautions must be adopted and strictly followed to protect all personal information," he said. "But otherwise, airlines are wise to promote all of the measures being taken reasonably to promote safety for passengers and crew. Airlines implicitly promise that their hull and contents are being operated safely and that everything needed for a safe flight has been obtained, e.g., fuel. So why not also put minds at ease that the coronavirus is being kept outside the aircraft?"

But Faegre Drinker's Miller said a policy or program that prevents people from traveling or obtaining services unless vaccinated could have a disparate impact on certain groups or be challenged as discriminatory.

"How will the industry account for vaccine hesitancy among pregnant women and minority communities? It will be important to ensure that COVID-19 travel passports are not limited to those who have been fully vaccinated, as some people may have religious or philosophical objections to the vaccine and others may need accommodations based on a disability or medical restriction that prevents them from getting vaccinated," Miller said.

Another issue that must be taken into consideration is immunity, she said.

"The big elephant in the room is immunity," Miller said. "It's still unclear how long immunity lasts after recovering from coronavirus or after being inoculated, and the answer may vary based on the individual. Will there be a standard expiration date to the travel passport based on the date of vaccine administration?"

And much like mask mandates during the height of the pandemic, vaccine passports are already primed to become a hotly debated topic among state and local governments. For instance, Florida Gov. Ron DeSantis issued an executive order Friday barring the Sunshine State from issuing COVID-19 vaccine passports and prohibiting businesses and establishments from requiring proof of vaccination for entry.

DeSantis' executive order states that so-called COVID-19 vaccine passports "reduce individual freedom and will harm patient privacy." Moreover, requiring them for taking part in everyday life such as attending a sporting event or going to a restaurant or movie theater "would create two classes of citizens based on vaccination," according to the executive order.

--Editing by Alanna Weissman.