

What Information is Off-Limits for Utah Employers Under the New Vaccine and Immunity Passport Restrictions Act?

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by Matthew M. Durham and Joshua Hughes

The Utah Legislature recently passed, and the Governor signed, The Vaccine and Immunity Passport Restrictions Act (“the Act”). This bill prohibits the use of vaccination or immunity status in public accommodations, governmental entities, and for employment decisions. Utah now follows Montana in prohibiting employment discrimination based on vaccine status. With such a small number of states taking this approach—and with an effective date of May 3, 2023—many employers are sure to have questions about what information is now “off-limits” and cannot be the basis of employment decisions under the Act. This article summarizes the issues employers operating in Utah should consider in light of Utah’s Act:

1. Who is covered by the new law?

The Act is broad and covers most private employers. There are no exceptions based on an employer’s size, so the Act applies to private employers large and small. The law also applies to all places of public accommodation and government entities of the State of Utah.

2. What does the law prohibit, in simple terms?

Simply put, the Act prohibits employers from making employment-based decisions on the basis of an individual’s possession of an immunity passport or based on their vaccination status. It also prohibits places of accommodation from discriminating on the basis of immunity status. Finally, government entities, like private employers, may not deny employment opportunities on the basis of vaccination status or possession of an immunity passport. Private employers operating in Utah may be affected by the provisions relating to employment discrimination *and* the law on public accommodations, if that employer operates a space that meets the definition of “public accommodation.”

3. What is an “immunity passport,” and what would qualify as “vaccination status?”

For employment purposes, an immunity passport is “a document, digital record, or

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software application indicating an individual is immune to a disease, whether through vaccination or infection and recovery.” Vaccination status means any information that would give “an indication of whether an individual has received one or more doses of a vaccine.” For practical purposes, medical records or vaccination cards could be considered “immunity passports.”

4. Can employers enforce vaccination requirement policies? What is prohibited by the law?

Generally, no. The Act states it is a discriminatory employment practice for an employer to refuse employment to an individual, bar an individual from employment, or otherwise discriminate against the individual in compensation or other terms and conditions of employment on the basis of vaccination status or immunity passport possession.

However, some employers are excluded from this general rule. The Act states that certain child care programs may maintain vaccination requirements so long as the requirements are carried out in accordance with the law. Employers who are subject to regulations requiring vaccinations from the Centers for Medicare and Medicaid or the Centers for Disease Control and Prevention are also excluded from the general prohibition. Certain federal contractors may also be exempt from the Act, too.

Finally, the Act provides an employer may make employment decisions on the basis of vaccination status or immunity passports if it can establish “a nexus between a vaccination requirement and the employee’s assigned duties and responsibilities,” or identify “an external requirement for vaccination that is not imposed by the employer and is related to the employee’s duties and responsibilities.”

5. Can employers ask about vaccination status?

Interestingly, the Act does not explicitly prohibit employers from requesting or inquiring into an individual’s vaccination status. Instead, employers cannot make employment decisions on the basis of that information (if they learn it). However, because any employment action taken on the basis of vaccination status is an unfair employment practice, employers should carefully consider before inquiring broadly into the vaccination status of its employees.

6. Does this just apply to COVID-19 vaccinations?

Nothing in the text of the Act limits its application only to COVID-19 vaccinations.

7. What situations might require disclosure of vaccination or immunity information?

Some employers may continue to require and enforce vaccine requirements under the exceptions listed in the law. For those employers—certain child care, health care, or others—requirements are likely the same after the passage of the Act. However, many employers who required vaccination records or vaccination may no longer be able to enforce those policies unless that employer can show “a nexus” between the employee’s job and the vaccination requirement.

8. What are the penalties under this law?

The Act will be officially codified under Utah's antidiscrimination in employment statute, so penalties for violating the Act will be similar to penalties for other claims of unlawful discrimination on the basis of a protected trait. With respect to claims of discrimination on the basis of vaccination status in public accommodations, any person "denied the rights" in the Act may file a complaint with the Utah Attorney General.

In summary, employers operating in Utah who require vaccination as a condition of employment should carefully determine whether their business fits within one of the exceptions to the Act or whether the requirement should be abandoned. Even employers who do not require vaccination as a term of employment should assess how and when employees might be asked to provide immunity-related information and ensure that information is not the basis for employment considerations. Employers—regardless of their employment policies on vaccination—should be aware the Act covers them as well if they operate a place of public accommodation. Importantly, the Act takes effect on May 3, 2023, so employers should move quickly to maintain compliance.