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## GOVERNMENTS ARE LIFTING VAX PASS REQUIREMENTS. WHAT IF BUSINESSES STILL WANT THEM?

Colleen Flood, Bryan Thomas and Kumanan Wilson | March 22, 2022

As we write, the incidence of Covid-19 cases and hospitalizations has trended downward, and provincial governments across Canada are lifting vaccine passport requirements. Officials in some provinces have suggested that businesses can, if they wish, continue requiring proof of vaccination from patrons. Restaurants, gyms, and other venues will have to determine for themselves whether doing so is prudent.

Although they may face backlash from some patrons unhappy with a continuing requirement to show proof of vaccination, businesses may find, overall, that they can attract more clientele by offering a safer place to dine, exercise, or watch a show.

As to whether requiring proof of vaccination truly provides a safer environment, double vaccination does initially reduce the risk of transmitting the Omicron variant, but this protection rapidly wanes. Businesses and consumers should be aware that the risk of transmission is reduced much more with three doses, but again this immunizing effect wanes over time.

Furthermore, businesses may be concerned about the legality of enforcing vaccination requirements on their own, without the backing of a government mandate. While government backing added some clarity on the legalities, our view is that requiring passports remains legal after government mandates are lifted. Governments have never passed a law that says, ‘no shirt, no shoes, no service,’ but that hasn’t stopped restaurants from enforcing the rule.

From the outset, concerns have been raised that vaccine passports may discriminate against the unvaccinated, in violation of human rights laws which apply to private businesses. As anti-discrimination laws only cover select traits, like race, gender, ethnicity, human rights tribunals in several provinces have clarified that vaccination status is generally not a protected trait. An exception is the rare circumstance where someone cannot be vaccinated for documented medical reasons and it would seem reasonable for a business to ask a customer for proof if that exception is claimed.

Vaccine passports have also raised privacy concerns. In the summer of 2021, as the provinces and territories started seriously contemplating vaccine passports, privacy advocates warned against creating a ‘show me your papers’ society. At the time, one answer was that vaccine passports would only be a temporary measure, lifted once the risk of health system overload subsided. If private organizations continue to demand proof of vaccination, after government has shelved its vaccine passport system, some may see this as proof that the critics were right all along.

From the standpoint of privacy law, the critical question is whether verifying patrons’ vaccination status is reasonable and serves a legitimate business purpose. The reduced risk of transmission should provide, in our view, reasonable grounds for many businesses to continue checking the vaccine status of patrons. This will of course vary by business— depending, for example, on the risk profile of patrons and

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employees, and their proximity in the business setting. (It is an open question how practicable this will be for businesses, over time, if booster shots are needed to maintain these protective effects and governments do not support updates to passport technology.)

With the recent spectacle of Canadian ‘freedom convoys’ making international news, it is worth reflecting on how the question of basic freedoms interact with vaccine passport requirements. Elsewhere, we have argued that vaccine passports do not infringe basic rights and liberties laid out in the Charter and enforced by our courts. Yes, you have a right to refuse vaccination, but that decision may come with day-to-day annoyances, such as being turned away from movie theatres and restaurants, for the protection of other patrons.

What has been less emphasized are the freedoms of people who want to— or have to, due to immunodeficiency— minimize their risk of exposure to Covid-19. As a society, we generally allow people to set the terms of private gatherings according to their own needs and preferences. We mentioned above how some restaurants require shoes and a shirt; others require a jacket and tie. With the crucial caveat that these restrictions don’t exclude anyone based on protected characteristics like race and gender, this ability to set conditions for private interactions is itself an important freedom.

Continued enforcement of vaccine passports requirements will offer some protection against spread, but it would make most sense to require three doses. The only certainty with respect to COVID-19 is its uncertainty and the pandemic has demonstrated the value of being prepared for the next challenge.

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