

Virus Immunity Passports Present Bias And Fraud Concerns

By **Jason Berland** (May 20, 2020)

If a person has been exposed to COVID-19 and has produced antibodies to the virus, that person may therefore be immune from reexposure. Tests for that, of unknown accuracy, have recently been rolled out in the U.S. after the U.S. Food and Drug Administration loosened restrictions to increase access to testing.



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The FDA has announced that researchers have begun evaluating the quality of these tests. If determined to be sufficiently accurate in finding antibodies and if those with antibodies are immune from reinfection at least for some time, then these tests could help scientists and government agencies determine who may be able safely to leave their homes and go back to work. Those, however, are two big ifs.

Recovery in this pandemic can only occur when people feel able to leave their homes for work, schools, restaurants, shops and travel to other places. With an effective and scalable vaccine at best still many months away, antibody tests could be the primary tool to separate society into those who are presumed to have immunity and those who do not and are susceptible to catching this easily transmitted virus and spreading the disease to others.

While this would undoubtedly be a huge breakthrough, we could be faced with a new legal dilemma: Is it lawful to discriminate based on lack of immunity from COVID-19? Antibody testing is a multistage process and at best a partial solution to the current crisis.

Even if serology tests that are sufficiently accurate will be on the market soon, that does not answer the question of what the presence of antibodies means for public health. As recently as April 24, the World Health Organization wrote: "There is currently no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection."

Nonetheless, as countries around the world move to emerge from lockdown, and scientists research whether there is a correlation between antibodies and future protection, several countries, including the U.S., have focused on immunity testing as a way to reopen society. However, until scientists, through human trials, establish some certainty that antibodies provide immunity, antibody testing will not end the lockdown.

But assume that the presence of antibodies indicates immunity. How do we move from testing to reopening the country, and the world? To make such a system work, easy proof of immunity must be available.

Immunity passports could allow those who have tested positive for antibodies to COVID-19 the freedom to return to work, shop and travel. These passports could even be electronic and have a QR code which could be scanned like a boarding pass and presented as needed for entry to a variety of venues.

Immunity passports, which can be viewed as a "get out of the house" card, are also an invitation for discrimination and fraud. First, and most significant, there could be discrimination in the workforce.

In a future with immunity passports, employers must make decisions about hiring and bringing back furloughed employees based on immunity, or lack thereof. The Americans with Disabilities Act requires employers to make reasonable accommodations for people with disabilities.

Having a COVID-19 infection can be a disability, but plainly having a normal immune system without evidence of a prior infection is not a disability. The ADA allows an employer not to hire individuals with a disability if they pose a direct threat to their own health and safety or that of the rest of the workforce.

The U.S. Equal Employment Opportunity Commission has opined that COVID-19 qualifies for the direct threat exception, meaning an employer may legally decide not to hire someone with the virus if that person poses a direct threat to the health and safety of himself or herself or to others.

This direct threat, however, deals with people who are infected, not those who have no antibodies and might become infected in the future. Yet given the lack of current adequate testing, it is impossible for an employer to know who is not infected or asymptomatic, so the mere absence of symptoms does not protect either the employer or the workforce.

Thus, employers are presented with a conundrum: hire only immune workers, which may create liability risk and also be too limited a number of workers to staff businesses, or hire asymptomatic workers but continuously test those who lack antibodies. Anti-discrimination protections will not solve the problem if employers cannot take steps to screen those who are or may become infected, at least not without massive and ongoing testing.

Thus, immunity testing has the potential to create two classes — the possibly immune and the not-sick possibly nonimmune. Employers will look to hiring immune workers only, i.e., the ones with immunity passports, so they do not need to incur the costs of structuring a workplace that is safe for those at risk. That may itself be discriminatory as able-bodied well workers may be rejected.

The potential for immunity-based discrimination does not begin and end in the employment sector. What happens if an individual cannot go back to school, enter a restaurant or travel without an immunity passport?

Not only will these well, uninfected people be required to remain sheltered in place, but they may have a perverse incentive to expose themselves to the potentially fatal illness — especially younger Americans, who it is commonly believed have a lesser chance of becoming seriously ill.

Before the development of an effective vaccine for chicken pox, some parents would throw chicken pox parties. By exposing a child to the disease at a young age, these parents thought they were protecting the child from a more serious disease if they were to contract it later in life. But COVID-19 is not chicken pox and the desire to get out of the house and move into the immune category could lead to significant public health risks.

Second, there is the risk of socioeconomic discrimination. Immunity passport plans would likely disproportionately affect lower-income and minority groups. The requirement of these immunity passports could, in practice, have a greater detrimental effect on the health of those working in certain industries and those with less income or savings.

Workers in white collar jobs are more likely to be able to continue to work remotely with access to computers, high-speed internet and other advanced technology. Those in service industries who must be physically at work to receive a salary and benefits might not be able to wait it out for months until a vaccine is developed, and the requirement of immunity passports for these people to get a job or return to work might incentivize those who have not contracted COVID-19 to expose themselves to the disease.

Thus, the incentive to join the ranks of the immune will not be distributed equally and those in need might be more inclined to expose themselves to the virus, despite significant health consequences, so that they can return to work and pay mortgages and feed their families.

Still another significant risk is fraud. Once an immunity passport program is rolled out, the people who are without a passport may seek to gain the privileges of possible immunity or companies may bend the rules to allow entry to those without valid passports in order to maximize profit. If immunity passports provide benefits they will be a valuable commodity.

People may be willing to provide test results from phony laboratories, use immunity passports belonging to others or obtain forged immunity passports. We would likely see prosecutions surrounding false immunity passports.

Moreover, the system could quickly break down with rising cases, as those using forged passports are not immune and are at risk of getting COVID-19. The system itself raises the potential for social division, fraud and public health risks. The only durable solution is vaccination, assuming vaccines can be developed and scaled rapidly.

Ultimately, whether or not a vaccine to COVID-19 will be mandatory will be a question left to the states. In *Jacobson v. Massachusetts*, state mandatory vaccination laws were upheld by the U.S. Supreme Court in 1905. That case dealt with a smallpox vaccination program, where the court ruled that such a mandate was fully within the state's power to protect public health, and that sometimes the freedom of the individual must be subordinate to the common welfare.

The federal government, which claims to be collaborating with private institutions to develop a vaccine by early 2021, could ultimately fund a national vaccination program but leave compliance orders to the states. People who choose not to vaccinate could face government-imposed limitations on travel, employment or schooling.

Those advocating for immunity passports believe antibody testing is the surest way to guarantee that the greatest number of people can smoothly transition back into society. But immunity passports may raise as many challenges as they solve.

The government will need to balance the need for reopening society with the dangers that could accompany immunity passport programs, and be cognizant of discriminatory practices and fraud that will certainly follow. At the end of the day, our eagerness to return to normal in reliance on an unproven idea with unknown consequences, could cause more harm than good.

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