

COVID-19 VACCINATION PRIVACY ACT

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House Bill 4667 (H-4) as reported from committee

Sponsor: Rep. Sue Allor

Committee: Oversight

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Analysis available at
<http://www.legislature.mi.gov>

BRIEF SUMMARY: House Bill 4667 would create a new act, the COVID-19 Vaccination Privacy Act, to prohibit a governmental entity from issuing a *COVID-19 vaccination passport*, requiring proof of vaccination status to access a public service, or imposing a penalty based on vaccination status. The bill would also allow for a civil action to compel a governmental entity to comply with the act or restrain it from further noncompliance.

FISCAL IMPACT: House Bill 4667 would not have a direct fiscal impact on the state or local units of government. (See **Fiscal Information**, below, for a detailed discussion.)

THE APPARENT PROBLEM:

As new COVID-19 infections begin to drop in some areas of the world, many states and countries are faced with how to safely lift restrictions on travel, indoor dining, gyms, sporting venues, offices and schools, and other indoor and outdoor gatherings. Israel has recently adopted use of a vaccine certification program called Green Pass for fully vaccinated persons. Green Pass, which can be in a smartphone app or in a physical format (e.g., a piece of paper with a bar code), will show a green check when scanned, and the holder then is granted access to businesses such as restaurants, movie theaters, and music venues. Reportedly, the European Union is also planning use of a Digital Green Certificate to facilitate border crossings between member countries and for air travel. In the U.S., the state of New York is experimenting with its Excelsior Pass, Hawaii is considering a “Safe Travels” vaccination passport, and more than a dozen versions of “vaccination passports,” which provide information on a person’s vaccination or recent COVID-19 test status in either digital or paper format, are currently in the development stage.

While some see vaccination passports as a safe, accurate, and uniform means to identify those who are less likely to contract or transmit the coronavirus, others have concerns that digitized vaccine information held by private or governmental entities poses privacy risks and the potential for abuse. Some see identification of the fully vaccinated as a way that more businesses can fully open, thus spurring economic recovery on a large scale. Others have raised concerns about a new tiered system of haves and have nots that would create greater access to normal life activities for some but withhold it from others based on a personal choice or ability to access a vaccine.

To date, several states have banned the use of passport vaccines to access public facilities or services either legislatively or through gubernatorial executive orders. Some believe that Michigan should also take action to preempt state or local governments from developing or issuing vaccine passports that could be used to restrict access to public services. Legislation addressing such concerns has been offered.

THE CONTENT OF THE BILL:

House Bill 4667 would create a new act, the COVID-19 Vaccination Privacy Act, to prohibit a ***governmental entity*** from issuing a ***COVID-19 vaccination passport***, requiring proof of vaccination status to access a public service, or imposing a penalty based on vaccination status. The bill would also allow civil actions to compel a governmental entity to comply with the act or to enjoin further noncompliance.

COVID-19 vaccination passport would mean a document or system created or used for the primary purpose of diminishing or enlarging an individual's civil and political rights, privileges, and capacities based on the individual's ***COVID-19*** vaccination status.

COVID-19 would mean severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

Governmental entity would mean any of the following:

- A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in state government.
- A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, public university or college, special district, or municipal corporation or a board, department, commission, council, or agency of any of those entities.
- Any other body created by state or local authority or primarily funded by or through state or local authority.

Prohibited acts

Except as otherwise provided by federal law, a governmental entity could not do any of the following:

- Produce or issue, or enter into a contract with a person to produce or issue, a COVID-19 vaccination passport.
- Require an individual to provide documentation certifying his or her COVID-19 vaccination status to access a public service.
- Impose a fine, fee, or penalty on an individual based on his or her COVID-19 vaccination status.

Injunctive relief

If a governmental entity were not complying with the act, the attorney general, the prosecutor for the county in which the governmental entity serves, or a person could bring a civil action to compel compliance or to enjoin (stop) further noncompliance with the act. An action for mandamus (a court order for the governmental entity to do a specific act that the entity has a legal duty or obligation to do but has not done) would have to be commenced in a court of appropriate jurisdiction. An action for injunctive relief against a local governmental entity would be brought in the circuit court in any county in which the entity serves. An action for injunctive relief against a state governmental entity would have to be commenced in the court of claims.

A person bringing an action for injunctive relief would not have to post security as a condition for obtaining a preliminary injunction or a temporary restraining order.

If a person brings an action for injunctive relief to compel the governmental entity to comply or to enjoin further noncompliance and succeeds in obtaining relief in the action, the person would recover court costs and actual attorney fees for the action.

FISCAL INFORMATION:

The bill would have no direct fiscal impact on the state or local units of government. Any costs incurred would be contingent on a violation of the provisions of the bill.

The bill could lead to increased administrative expenses to the Department of the Attorney General (AG) and county prosecutor offices by allowing these entities to commence civil actions against public entities charged with not complying with the bill. The bill could lead to further increased costs to state and local public entities if a court ruling subjects those entities to pay settlement costs to the plaintiffs.

The bill allows, but does not require, the AG or county prosecutor office to commence a civil action, and any administrative costs related to dedicating staffing resources to commencing a civil action would be noncompulsory. It is not yet known how many court proceedings would commence as a result of the bill and whether these caseloads would require additional state and county legal staffing. The annual FTE cost for an attorney with the AG is approximately \$200,000.

ARGUMENTS:

For:

Now that the rate of new COVID-19 infections is decreasing, new concerns are surfacing. The ability to be inoculated against the coronavirus has become more accessible, and those wishing to receive a vaccine have greater ease of obtaining it. However, not all will be vaccinated. Allergies, certain medical conditions, and previous adverse reactions to other vaccines mean that vaccination may be medically inadvisable for some. Those who are immunocompromised may not develop a strong antibody response and therefore may decide against vaccination at this time. Others may have concerns over yet unknown long-term health effects. The decision as to whether or not to be vaccinated is one that should be made between a person and his or her doctor and conscience.

Currently, there is no mandate for people to be vaccinated, but a concern is growing, as some states and countries experiment with so-called “vaccination passports,” that such systems could be used as a gatekeeper to determine who could and who could not access certain public services or could erode or violate basic rights. For instance, some ask, could an unintended consequence of vaccine passports be the emergence of a two-tiered culture where the vaccinated have access to the traditional benefits of citizenship, while those who are not vaccinated, or who are but do not feel that their vaccination status should be public information, are excluded from the same level of access? Concerns include potential impacts on employment, housing, education, travel, and even day-to-day activities such as having access to stores, concerts, and sporting events.

Others note that all too often the public is informed of yet another data breach of personal and confidential information that can be used for identity theft or other scams. If large financial, health, or insurance companies are not immune to data breaches, what guarantee would an

individual have that a vaccine passport app could not be hacked and their personal information in the company's database be used in unintended ways? For that reason, even some who are vaccinated may not want to participate in a vaccination passport system.

Rather than wait for the public to be harmed before acting, some feel that the legislature should preemptively prohibit any level of government, whether local or state, city hall or a public school, from involvement in developing or issuing a vaccination passport related to COVID-19 vaccination status that has as its primary purpose diminishing or enlarging a person's civil or political rights. No examples were offered during committee testimony as to how HB 4667 would be implemented, but it was stated that the bill would not impinge on the business practices of private entities. Even though Michigan has no plans to develop or mandate the use of a COVID-19-related vaccination passport, supporters argue that the bill would ensure that all levels of government would have parameters for what they could not do going forward. The bill would also allow the attorney general, county prosecutors, or any citizen to sue a governmental entity that was not complying with those guidelines to force compliance or to stop the noncompliance. The bill is thus seen by its proponents as proactively protecting citizens from any potential discriminatory governmental practices as the state emerges from the restrictions imposed during the pandemic, so that all, and not just some, are able to return to a normal life.

Against:

Opponents of HB 4667 argue that it is flawed on many accounts. For example, if the bill is interpreted as prohibiting access to vaccine status information by a private company, it could have a chilling effect on private companies who have or are developing vaccination passport systems and that rely on government databases for reliable information on vaccine status, and individuals wishing to use such applications could be locked out. The bill contains many broad or vague phrases that invite litigation to determine exactly what it would do. For instance, the definition of "vaccination passport" would prohibit one created by a government entity that is *intended* to diminish or enlarge rights, civil and political, based on vaccine status. What if the document or system was instead intended to reduce deaths or the debilitating effects of COVID-19 infections or to prevent the implementation of future state- or community-wide shutdowns of public and private services if a resurgence of infections required such intervention? It is unclear whether that document or system would be compliant with the new act because its intent was to preserve the health and safety of the public.

Opponents argue that the language of the bill would also raise other questions. Could the state's public universities and colleges be prevented from restricting dormitories to only vaccinated students, even if it resulted in reduced enrollment or vacant dorm rooms, because parents did not want their children living in close quarters with unvaccinated roommates? Would "civil rights" be limited to those protected under federal and state civil rights acts? What would "political rights" encompass? Could Michigan's citizen's rights be negatively affected if the federal government or other states or countries restricted entry to those without proof of vaccination or recent COVID-19 testing and Michigan residents could not present that proof because the bill had been interpreted as prohibiting a Michigan governmental entity from providing limited access to vaccination information to a private company that offered an app to citizens who wanted it?

In short, opponents of the bill argue that it may have unintended consequences that could inadvertently restrict the choices of citizens or limit emergency responses in the face of a

virulent strain posing a threat to public safety. How COVID-19 will play out is still unknown, and some feel that to try to preempt an infinite number of possibilities that may never happen should not be the focus of legislation. If issues of discrimination or impingement on the rights of any citizen, vaccinated or not, begin to surface, legislation specific to the emergent conduct could be crafted in response.

POSITIONS:

Representatives of the following entities testified in support of the bill (5-6-21):

- American Constitutional Rights Union and the American Constitutional Rights Union Action Fund
- Right to Life Michigan
- Michigan Vaccine Injured Individuals and Families

The following entities indicated support for the bill:

- Macomb County Republican Party (5-6-21)
- Stand Up Michigan (5-6-21)
- Lighthouse for Teen Moms (5-6-21)
- Michigan for Vaccine Choice (5-6-21)
- Michigan Health Choice Alliance (5-6-21)
- Us Against the Media (5-13-21)

The Michigan Health & Hospital Association indicated opposition to the bill. (5-6-21)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.