

# COVID-19 and Returning to the Workplace: A Focus on Vaccination Policies and Other Key Employment Law Issues

Monday, July 26, 2021

Proskauer»



# Presenters

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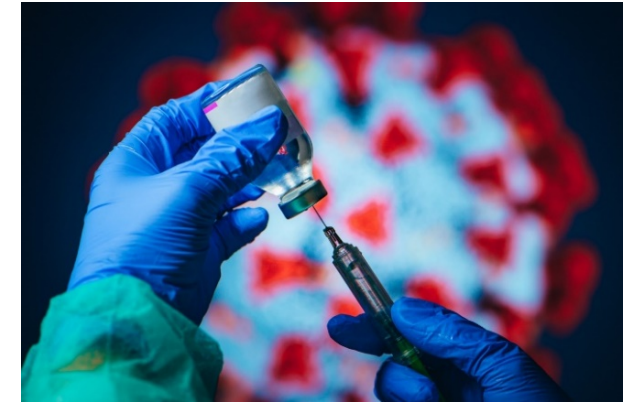
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# Today's Agenda

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- The Current State of the Pandemic, Including the Delta Variant
- Key Considerations for Timing of Workplace Reentry
- COVID-19 Vaccination Policies
- New York HERO Act Update
- COVID-19 and the Workplace: Frequently Asked Questions
- Your Questions

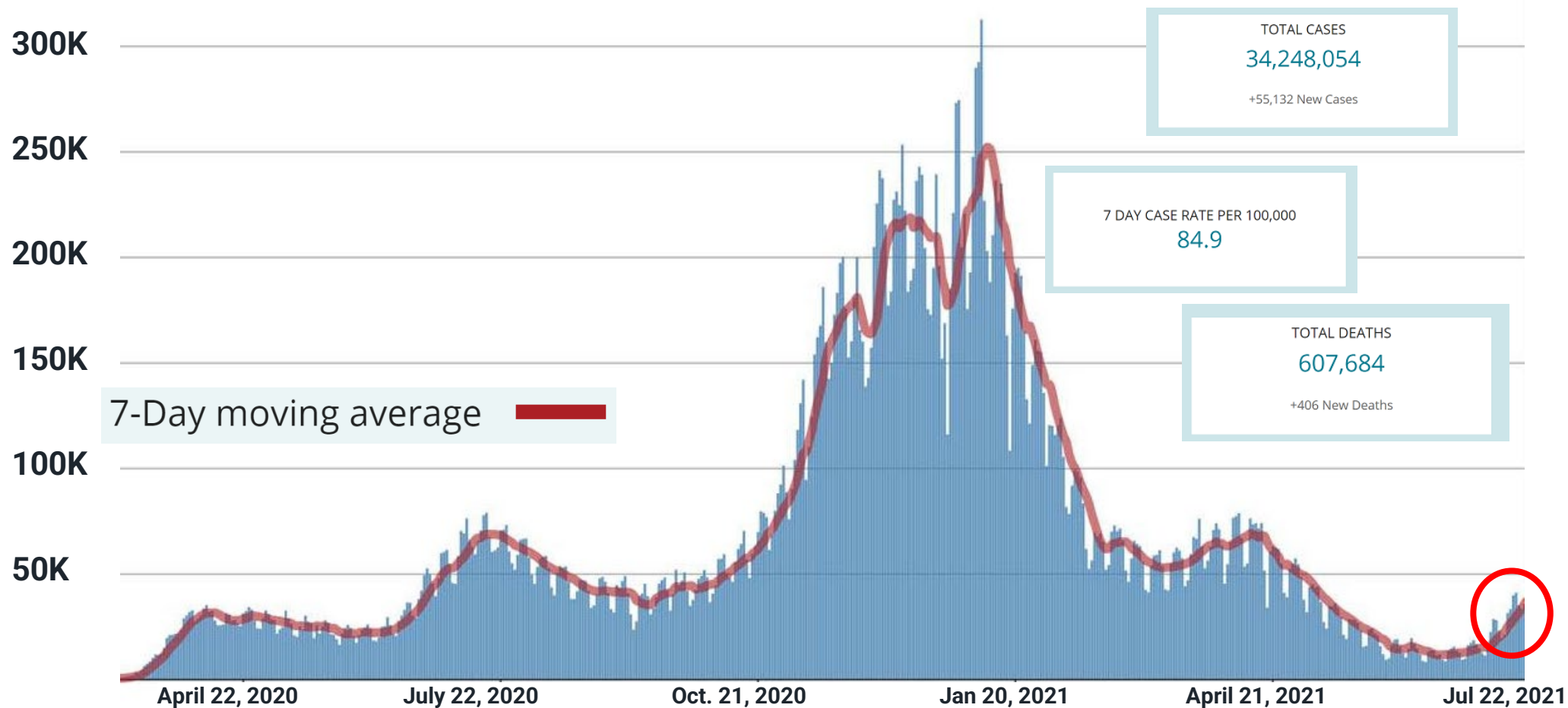




# The Current State of the COVID-19 Pandemic

# After a Decline in June, COVID-19 Cases are Now Increasing






Daily Trends in Number of COVID-19 Cases in the US reported to the CDC, as of July 21, 2021



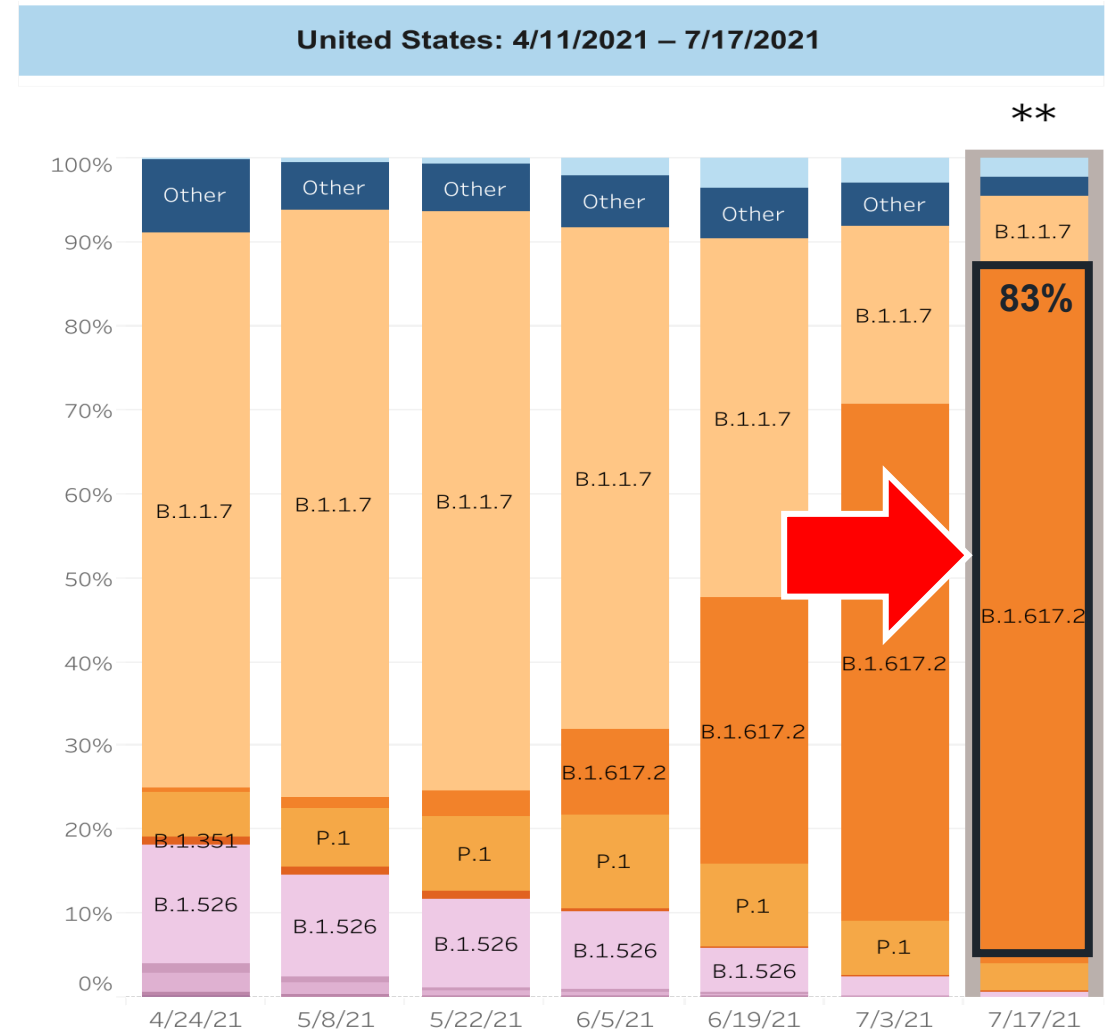
[https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrends](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrends)

# Increase in Cases are Attributed to Delta Variant

**The Delta variant has doubled in proportion about every 2 weeks in the US**

	Lineage		
Most common lineages #	B.1.617.2	Delta	
	B.1.1.7	Alpha	
	P.1	Gamma	
	B.1.526	Iota	
Other*	Other		

<https://covid.cdc.gov/covid-data-tracker/#variant-proportions>



\*\*

# COVID-19 Delta Virus Variant

## Why Concern?

- Viruses constantly change through mutation, and new variants of a virus are expected to occur over time.
- Mutations that “benefit” viral replication and survival perpetuate
- **Concerns:**
  - **Spreads faster and more easily** from person to person
    - 1,000 times more virus produced - 60% more transmissible
  - Vaccines are still effective but **Must be fully vaccinated**
    - 33% effective after 1<sup>st</sup> dose
    - 88% effective for mRNA vaccines after 2 doses
  - **May cause more serious disease**

Li et al., 2021  
<https://www.medrxiv.org/content/10.1101/2021.07.07.21260122v1>

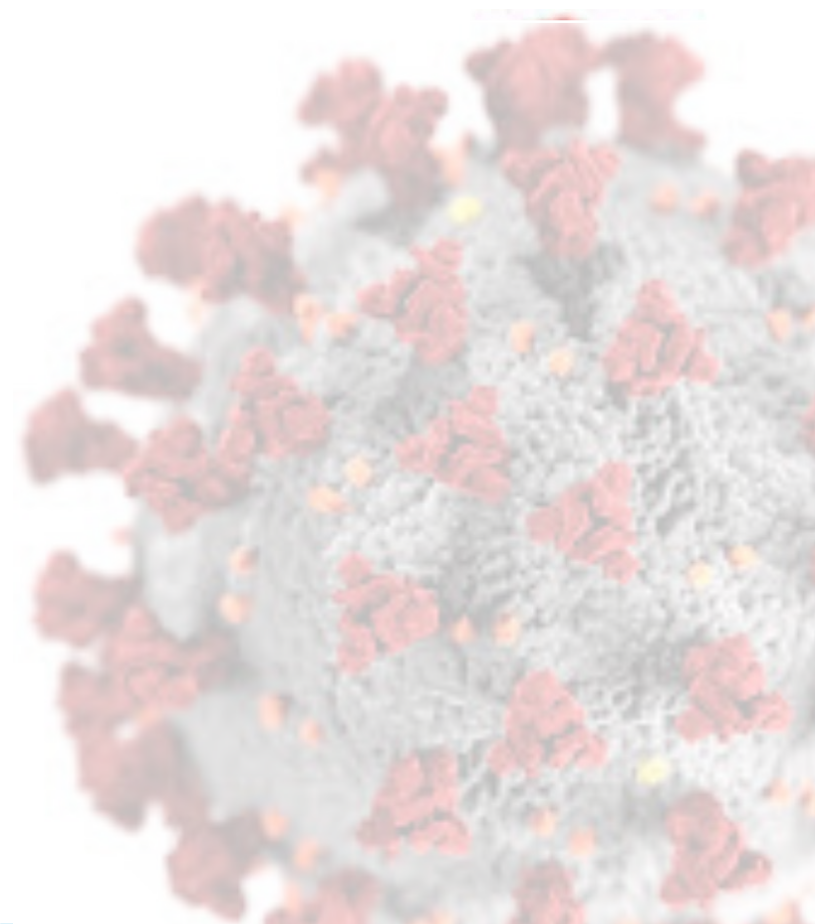
PHE  
<https://www.gov.uk/government/news/vaccines-highly-effective-against-b-1-617-2-variant-after-2-doses>

# COVID-19 Vaccines: Key Points

- Vaccines are safe and widely accessible
- All COVID-19 vaccines in the US are effective against COVID-19, including high level of protection against serious outcomes like severe disease, hospitalization, and death
- All currently authorized vaccines offer protection against the Delta variant
- Vaccinated people are less likely to get infected or to transmit to others
- **New cases and hospitalizations are almost always among unvaccinated**

# Return to Workplace: Two Key Decisions

**WHEN?**  
and  
**HOW?**



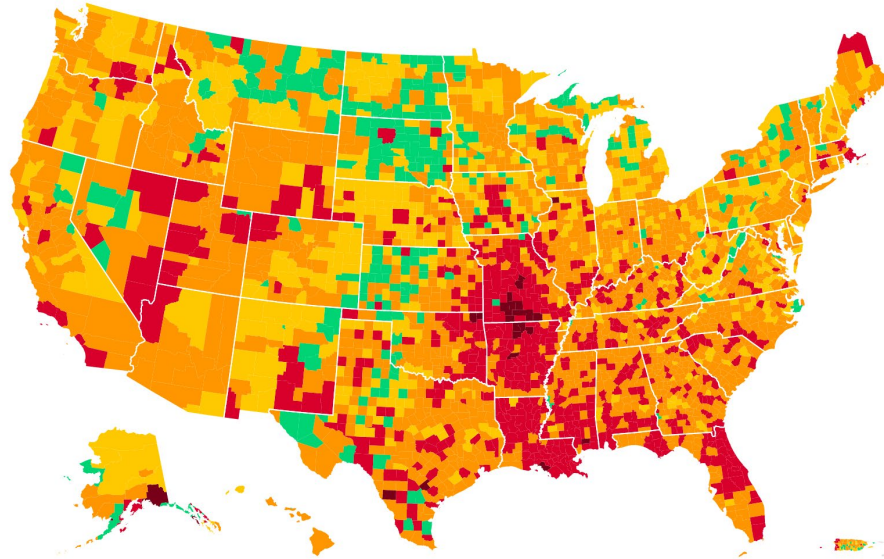
# Key Factors That Inform When to Return to Workplace

## FRAMEWORK INFORMS WHEN TO RETURN

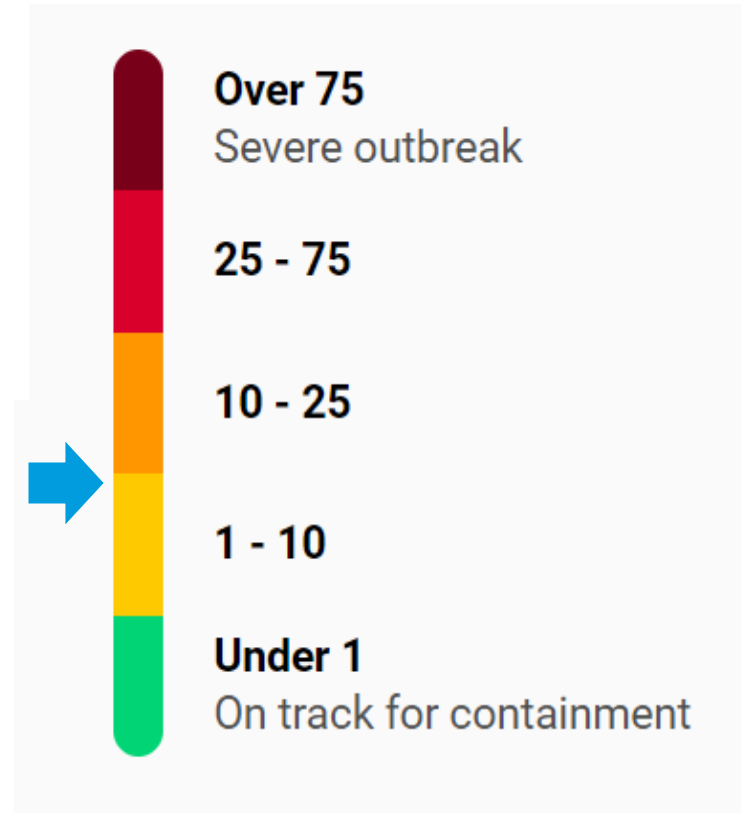


<https://www.healthpreparednesspartners.com/blog/an-introduction-to-health-preparedness-partners-return-to-work-framework>

# The Number of Daily New Cases Affects Decisions About Return to Workplace

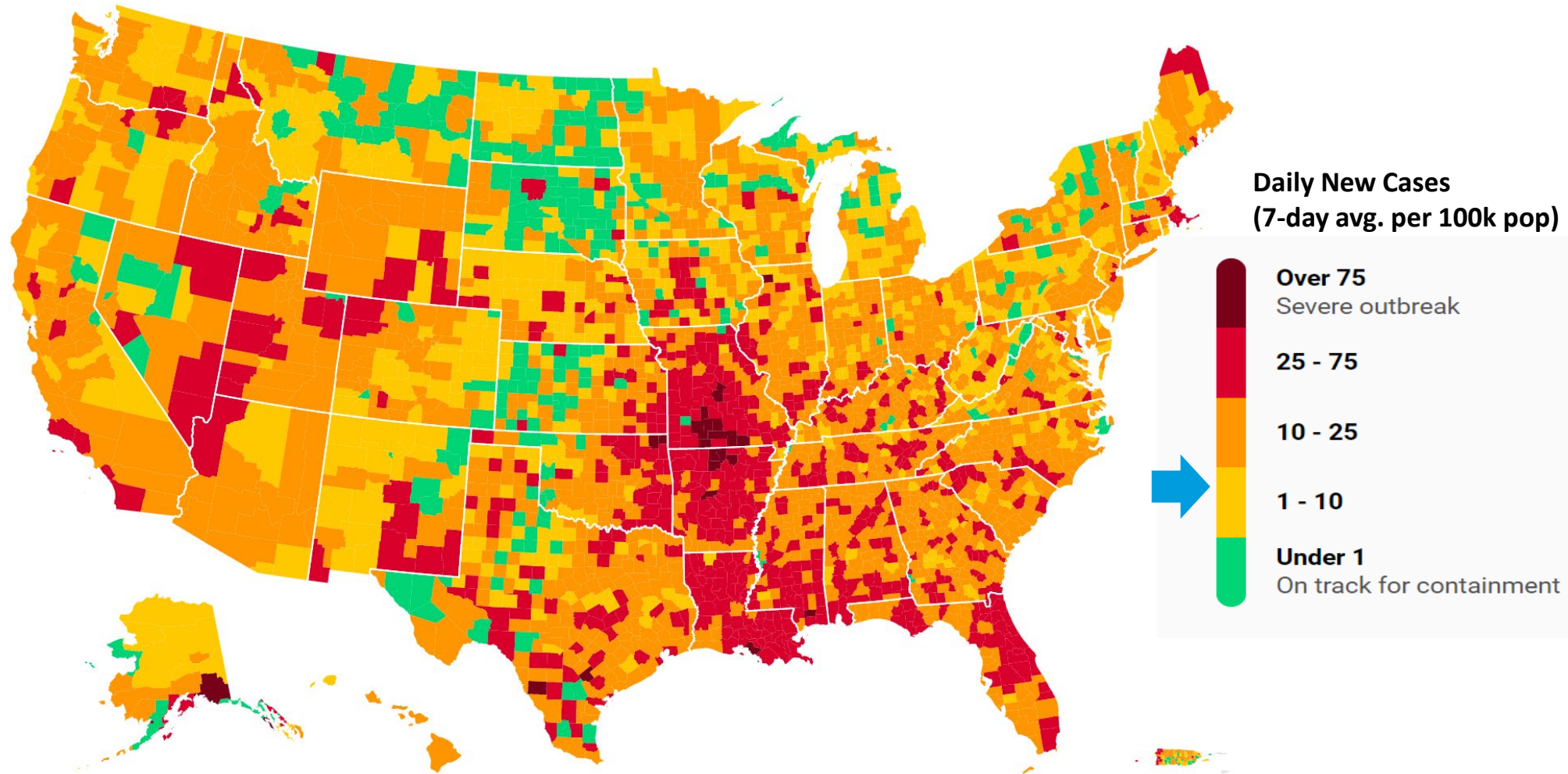


Daily New Cases  
(7-day avg. per 100k pop)



<https://covidactnow.org/?s=2064985>

# Many Counties are Above RTW\* Threshold



As of July 23, 2021

\*RTW = Return to Workplace

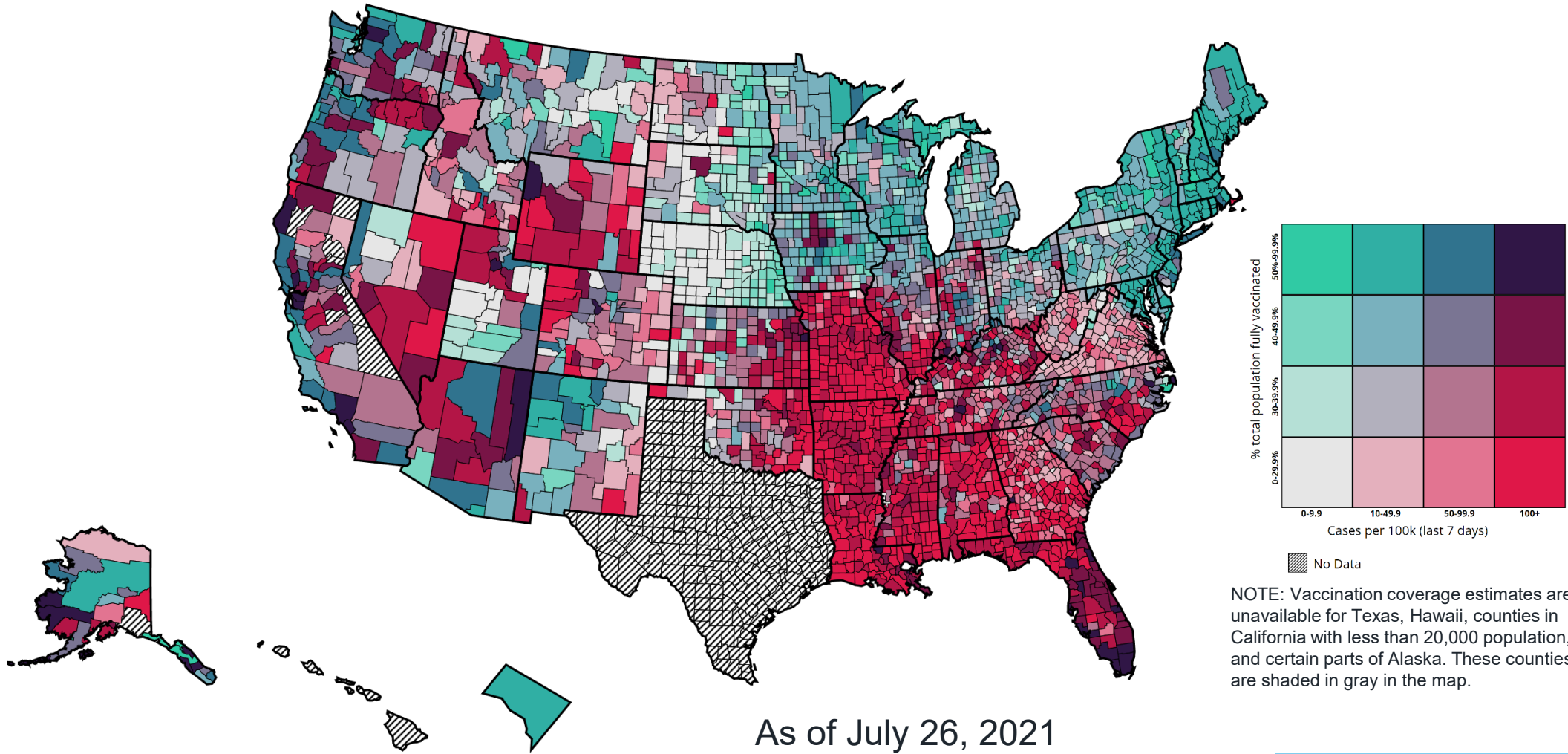


<https://covidactnow.org/?s=2064985>

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# Cases are Higher in Communities with Lower Vaccination Rates: Can Inform Reopening Policies

US COVID-19 Reported Cases per 100,000 Population (last 7 days) and Percent of Total Population Fully Vaccinated by County



<https://covid.cdc.gov/covid-data-tracker/#vaccination-case-rate>

# Several Options for Vaccination Policies


- **Require that all employees returning to the workplace are fully vaccinated**
  - Policy applied universally to all workforce
  - Determine if have to show proof of vaccination status
  - Provides highest level of protection
- **Strongly encourage vaccination, but do not require vaccination**
  - Incentives may be offered
  - Education about vaccination provided
  - Create plan to protect unvaccinated employees
- **Do not establish a specific vaccination policy**
  - Return to workplace policies are silent about vaccination status
  - Create plan to protect unvaccinated employees

## For ALL policy choices:

- Ensure that vaccination policy reflects corporate culture
- Communicate policy well in advance of return to workplace
- Provide reasonable accommodations to those who do not get vaccine because of medical or religious reasons


<https://www.healthpreparednesspartners.com/blog/return-to-the-workplace-determining-vaccination-policies>

# If Vaccination is Required, Options for Proof of Vaccination



**COVID-19 Vaccination Record Card**

Please keep this record card, which includes medical information about the vaccines you have received.  
Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido.



\_\_\_\_\_  
Last Name First Name MI

\_\_\_\_\_  
Date of birth Patient number (medical record or IIS record number)

Vaccine	Product Name/Manufacturer Lot Number	Date mm / dd / yy	Healthcare Professional or Clinic Site
Dose VID-19		mm / dd / yy	
Dose VID-19		mm / dd / yy	
		mm / dd / yy	
		mm / dd / yy	

- Ask staff to upload vaccination card to company system
- Use third party “vaccine passport” such as Clear or Excelsior Pass (NY)
- Require staff to attest to their vaccine status in written form, but not submit proof
- Communicate to staff that only fully vaccinated persons can return to the worksite, no proof is requested (honor system)



# Employer Vaccination Policy Study

## What Impact will a Company COVID-19 Vaccination Policy Have on Productivity and Health-related Costs?

- Analysis of 10 simulated companies with 1,000 employees in 10 US cities.
- Each company “re-opened” their offices August 16, 2021
- Evaluated the impact of various employee vaccination policies for a four month period on productivity (missed work days) and health costs ( direct costs for illness and costs for “long-COVID) after the workplace reopens
- Three employer vaccination policies were evaluated

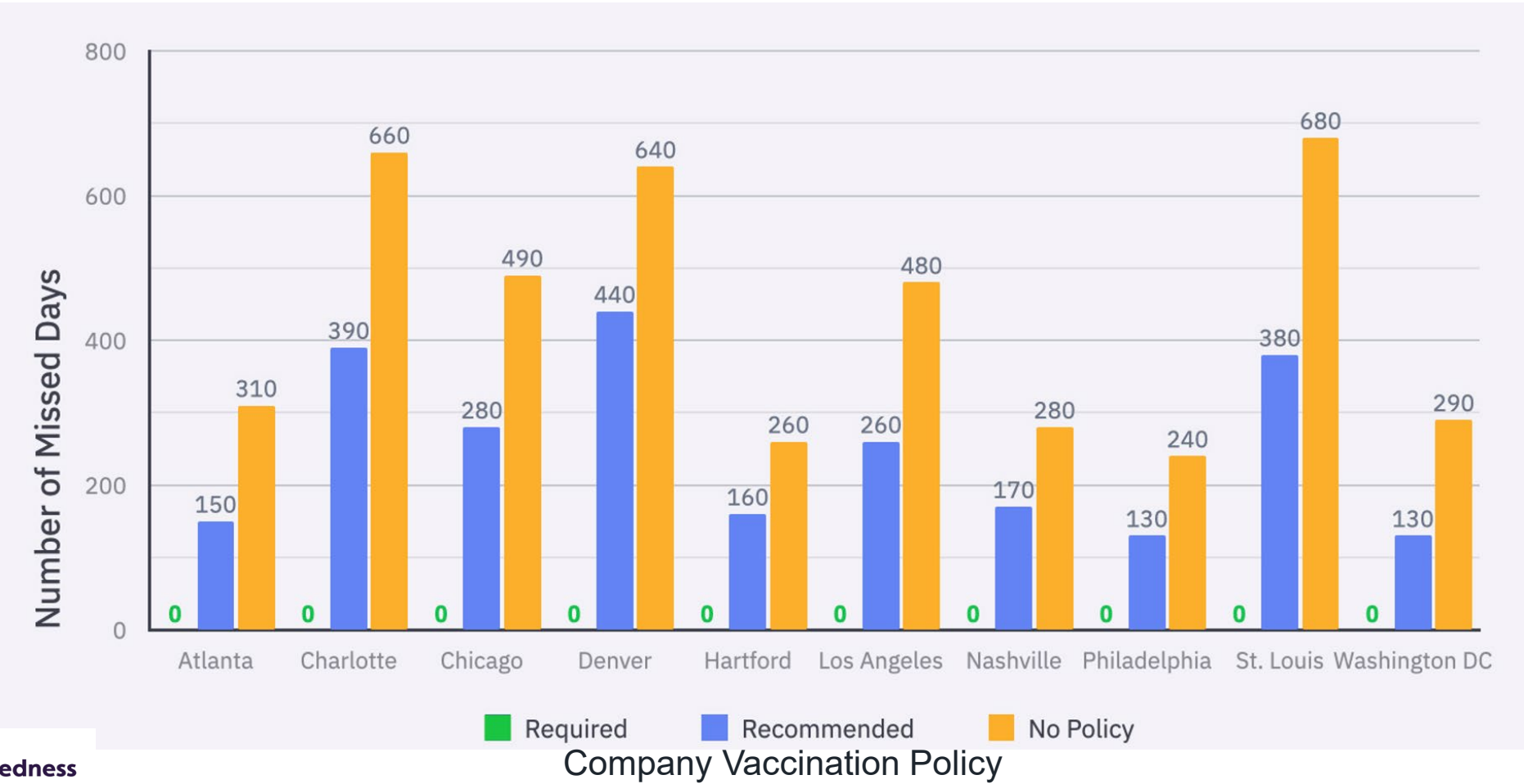
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**EPISTEMIX**

See: <https://blog.epistemix.com/blog/is-a-covid-19-vaccine-policy-right-for-your-business> and <https://www.healthpreparednesspartners.com/blog/return-to-the-workplace-determining-vaccination-policies>



# Estimated COVID-19 related missed workdays for simulated companies with 1,000 employees in 10 cities in US, by vaccination policy

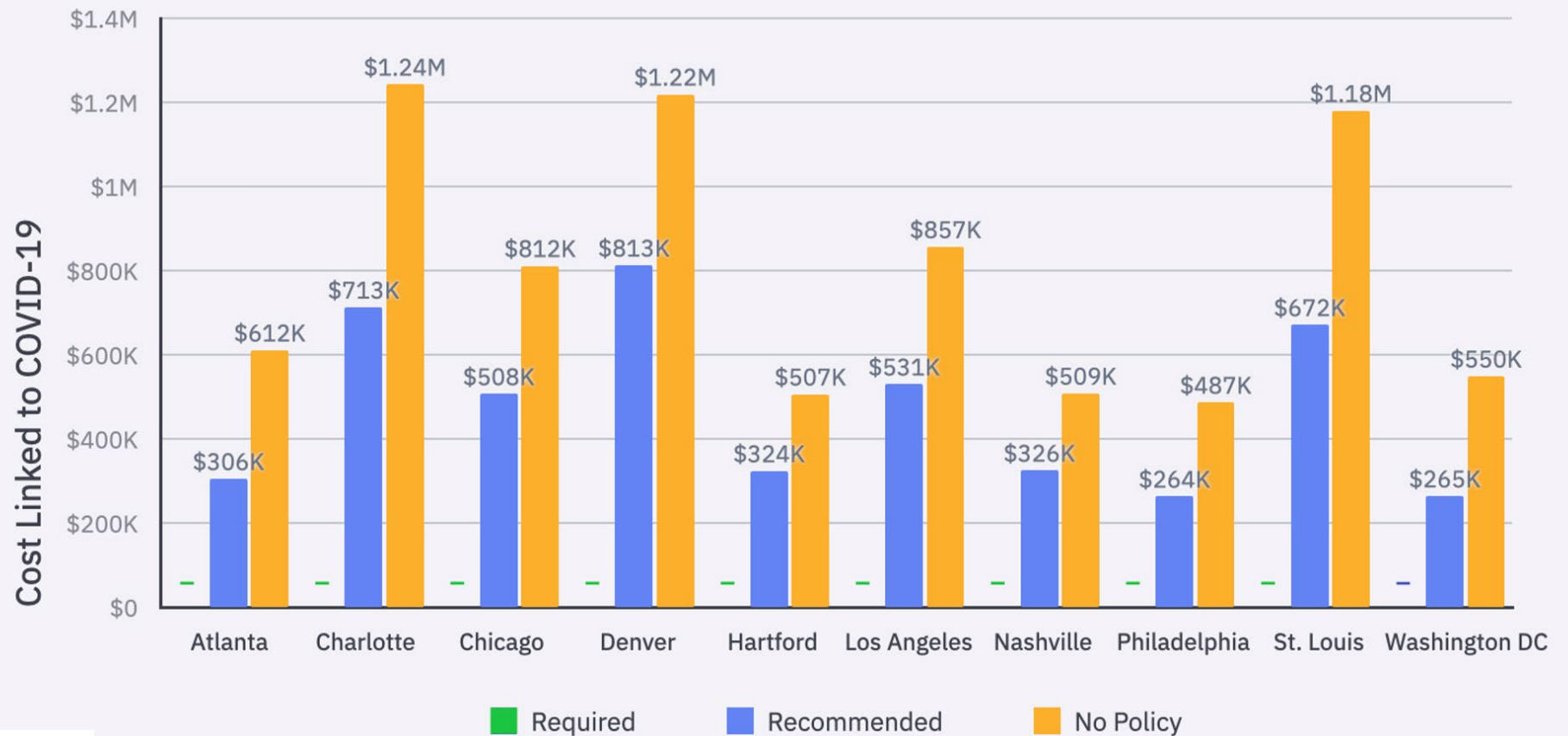


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See: <https://blog.epistemix.com/blog/is-a-covid-19-vaccine-policy-right-for-your-business> and <https://www.healthpreparednesspartners.com/blog/return-to-the-workplace-determining-vaccination-policies>

# Estimated COVID-19-associated health costs for simulated companies with 1,000 employees in 10 cities in US, by vaccination policy



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Company Vaccination Policy

EPISTEMIX

See: <https://blog.epistemix.com/blog/is-a-covid-19-vaccine-policy-right-for-your-business> and <https://www.healthpreparednesspartners.com/blog/return-to-the-workplace-determining-vaccination-policies>

# Employer's Support for Vaccination Policy

**88%** Of employers will require or encourage vaccination for employees

**40%** Require all employees to be vaccinated against COVID-19

**32%** Encourage but not require employees to be vaccinated against COVID-19

**16%** Require some employees to be vaccinated against COVID-19

**8%** We don't have a policy developed at this time

**4%** We don't plan to encourage or require our employees to be vaccinated against COVID-19

**Poll conducted online March 1-31, 2021 by Arizona State University/ sponsored by Rockefeller Foundation of over 1160 US & UK employers (71% were US businesses & 75% had > 250 employees)**

<https://www.rockefellerfoundation.org/wp-content/uploads/2021/04/ASU-Workplace-Commons-Phase-2-Report-4-28-21.pdf>

# Workers Whose Employers Provided Paid Time Off or Encouraged Vaccination Are More Likely To Report Being Vaccinated

■ Already received at least one dose ■ As soon as possible ■ Wait and see ■ Only if required ■ Definitely not get it

## Employer provided paid time off to get the vaccine or to recover from any side effects



## Employer encouraged employees to get vaccinated



NOTE: Based on those who are employed but not self-employed. See topline for full question wording.  
SOURCE: KFF COVID-19 Vaccine Monitor (June 8-21, 2021) • [Download PNG](#)

[KFF COVID-19 Vaccine Monitor](#)

# Over Half of Adults Support Employer Vaccination Requirements, Over Two-thirds of Vaccinated Respondents Support Mandates

Percent who say employers should...

Require employees to get vaccinated for COVID-19 unless they have a medical exemption

Total

51%

**COVID-19 vaccination status**

Vaccinated

68%

Unvaccinated

19%

# CDC's current guidance advises when you've been fully vaccinated:

**May 13, 2021: Fully vaccinated people can resume activities without wearing a mask or physical distancing** except where required by federal, state, local, tribal or territorial laws, rules and regulations including local business and workplace guidance.

## **EXCEPT:**

**July 16, 2021:** People who have a condition or are taking medications that weaken their immune system may NOT be protected even if they are fully vaccinated. They should continue to take all **precautions recommended for unvaccinated people, including wearing a well-fitted mask**, until advised otherwise by their healthcare provider.

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html#vaccinated>

# Current CDC Guidance: Vaccination Policies Inform Other Workplace Protective Measures

## Implications of Workplace Vaccination Policy

### VACCINATION REQUIRED

- No masks required\*
- Avoid crowding
- OK for food/beverages
- Resumption of meetings and work-related social gatherings

### VACCINATION NOT REQUIRED

- Masks required for unvaccinated\*
- Physical distancing/barriers
- Limited food/beverages
- Attendance at meetings and work-related social gatherings (w/mask) and distancing

\* CDC advises that immunocompromised persons continue to wear masks, even if vaccinated

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html#vaccinated>

# For more information about vaccination policies...

Return to Workplace blog post:

<http://healthpreparednesspartners.com/blog>



Return to the Workplace:  
Determining Vaccination Policies

# Upcoming flu season

- Influenza (flu) activity during the 2020–2021 season was at historic lows in US and globally
- Relaxed COVID-19 mitigation measures will likely result in the resumption of seasonal flu virus circulation and other viruses
- CDC warns could be an early and possibly severe flu season.
- Annual flu vaccine very important especially for people who are at higher risk
- Flu symptoms tend to be very similar to those of COVID-19
- **Employers can encourage flu vaccination**



<https://www.cdc.gov/flu/business/index.htm>

# Thank you!

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The logo graphic for Health Preparedness Partners features three stylized human figures. The first two are blue and the third is green, all with their arms raised in a supportive or celebratory gesture.

# New York HERO Act Update



# New York HERO Act – Background

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- **Section 1:** All employers in New York must implement certain safety standards and adopt a prevention plan to protect against the spread of airborne infectious diseases.
- **Section 2:** Employers with at least 10 employees **must allow** employees to establish a joint labor-management workplace safety committee.
  - Each committee must be composed of employee and employer designees.
  - Committees are authorized to (among other things):
    - Raise health and safety concerns;
    - Review safety policies and reports;
    - Participate in certain site visits; and
    - Schedule meetings during work hours at least once a quarter.
- The requirements can be waived by a **CBA** if it references the applicable provisions.

# New York HERO Act – July 6 Update

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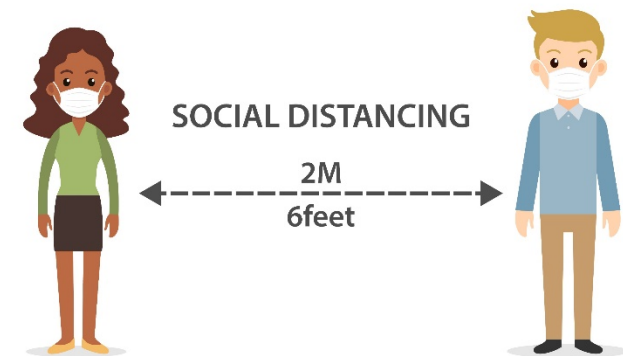


- On July 6, the NYDOL published:
  - The Airborne Infectious Disease Exposure Prevention Standard;
  - A Model Airborne Infectious Disease Exposure Prevention Plan; and
  - Eleven industry-specific model plans.
- Employers may either:
  - Adopt the model plan applicable to their industry; or
  - Establish a plan that meets or exceeds the requirements provided by the Standard.
    - Employers that adopt their own plan must adopt such plan pursuant to an agreement with the collective bargaining representative or, if none, with the meaningful participation of employees.
- The state has issued eleven industry-specific templates.
  - All other sectors for which no industry-specific plan is available – including office-based workplaces – should refer to the Model Plan.

# New York HERO Act – July 6 Update *(cont'd)*



- The Standard addresses the following topics, which must be included in each employer's written plan:
  - Health screenings;
  - Face Coverings and other PPE;
  - Physical Distancing;
  - Hand Hygiene Facilities; and
  - Cleaning and Disinfection.
- The model plans also address:
  - Stay at home policies;
  - Respiratory etiquette; and
  - Accommodations for those with added risk factors.



# New York HERO Act – July 6 Update *(cont'd)*

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- **What employers need to do now:**

1. **Adopt a Plan:** Employers must adopt a model plan or establish a plan that meets or exceeds the requirements provided by the Standard by August 5.
2. **Distribute the Plan:** Employers must distribute the plan within 30 days of adoption, 15 days after reopening after a closure due to an airborne disease, and to new hires.
  - The plan must be provided in English and in each employee’s primary language, if a model standard is available in that language.
3. **Post the Plan:** The plan must be posted in a visible and prominent location at each worksite, with the exception of vehicles.
4. **Update Handbook:** For employers that provide employee handbooks, the prevention plan must be included.

# New York HERO Act – July 6 Update *(cont'd)*

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- The prevention plan **only applies** when the state designates an airborne infectious disease as a highly contagious communicable disease that presents a serious risk of harm to the public health.
  - No designation has yet been made; **therefore, plans are not required to be in effect/activated**. However, employers must adopt and distribute a plan by August 5.
- **Once an airborne infectious disease is designated, employers must:**
  - Review their plan and update it, if necessary;
  - Finalize and promptly activate the plan;
  - Conduct a “verbal review” of employer policies, employee rights, and the employer’s plan; and
  - Provide each employee with the plan and post a copy at the worksite (again).
- While the designation remains in effect, employers must take certain steps to ensure that the plan is followed.



# Mandatory Vaccination Programs in Employment

Subtitle

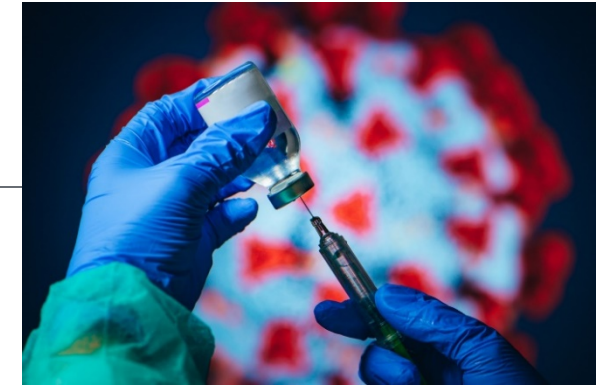
# COVID-19 Vaccinations: United States

- The EEOC has issued guidance clarifying that employers **may require employees to be vaccinated**, subject to certain limitations and exceptions.
- Some have suggested that the FDCA prohibits employers from mandating vaccines authorized for emergency use by the FDA.
  - On June 12, 2021, a federal district court in Texas held that the FDCA does not prohibit mandatory vaccination policies in employment.
  - Other litigation is currently pending.



# COVID-19 Vaccinations: United States: Reasonable Accommodations

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- Employers must provide reasonable accommodations:
  - For known **disabilities** of employees; and
  - For an employee’s sincerely held **religious beliefs**.
- **Examples** of accommodations:
  - Requiring the use of a mask or other types of PPE;
  - Requiring the employee to work at a social distance from others;
  - Requiring the employee to work a modified shift;
  - Submitting to periodic testing and/or maintaining a temperature log; and/or
  - Reassigning the employee to a vacant position that does not require vaccination.
- There is no obligation to provide the accommodation of the employee’s choice, so long as a reasonable accommodation is offered.

# COVID-19 Vaccinations: United States: Limits on the Duty to Accommodate

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- Employers do not have a duty to provide reasonable accommodations that would impose an “**undue hardship**” on the employer.
  - **ADA standard:** Significant difficulty or expense incurred by the employer.
  - **Title VII standard:** More than a *de minimis* cost or burden.
- Employers may deny **disability-related** accommodations where there is no available alternative that alleviates the “**direct threat**” posed by an unvaccinated employee.
  - **Direct threat:** A significant risk of substantial harm that cannot be eliminated or reduced by **reasonable accommodation**.

# COVID-19 Vaccinations: United States: Limits on the Duty to Accommodate *(cont'd)*

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- **Direct Threat Exception** *(cont'd)*

- The factors that make up the direct threat assessment are the:
  1. Duration of the risk;
  2. Nature and severity of the potential harm;
  3. Likelihood that the potential harm will occur; and
  4. Imminence of the potential harm.
- The determination should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19.
- In making the assessment, employers should consider the number of other employees at the worksite who have received the vaccine.

# COVID-19 Vaccinations: State Law Considerations

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- **Montana:** “It is an unlawful discriminatory practice for ... an employer to refuse employment ... or to discriminate against a person ... based on the person’s vaccination status or whether the person has an immunity passport.”
- **Texas and Florida:** Businesses may not require **customers** to provide documentation regarding their COVID-19 vaccination or recent recovery from COVID-19 in order to gain access to or receive services from the business.
  - Note: Both laws are silent regarding proof of vaccination from **employees**.
- **Arkansas and Utah:** Government agencies cannot require a COVID-19 vaccine as a condition of employment.



# FAQs and Your Questions



# COVID-19 and the Workplace: Frequently Asked Questions

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1. Can employers require only non-fully vaccinated staff to wear face coverings?
2. Can employers segregate fully-vaccinated and non-fully vaccinated employees in the office?
3. What trends are we seeing in terms of client vaccine policies?
4. Can employers require employees to provide proof of vaccination?
5. What confidentiality rules apply to information that employers receive about employees' vaccination status?

## **COVID-19 and the Workplace: Frequently Asked Questions** *(cont'd)*

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6. What record retention rules apply to information that employers receive about employees' vaccination status?
7. Can employers ask employees who are unwilling to be vaccinated to provide their reason for refusing vaccination?
8. Can employers provide incentives for employees to get vaccinated?
9. Can employers require only employees in certain positions (e.g., customer-facing positions) to be vaccinated?

# Q&A With Lisa Koonin

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