

# Goodbye COVID-19 Priority Phases and Tiers, Hello Battles With Vaccine Passports!

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On Tuesday, April 6, 2021, while touring a vaccination site in Alexandria, Virginia, President Joe Biden imposed a deadline on every state to open up vaccination eligibility *to all adults* by April 19, 2021 (moving up the previous target date of May 1, 2021). The White House COVID-19 coordinator, Jeffrey Zients, told governors also on April 6, 2021, that more than 28 million doses of vaccines will be delivered to all of the states the week of April 4-12, 2021. The president's directive matches Dr. Anthony Fauci's [estimate](#) in November 2020 that the earliest a vaccine would be available for most nonprioritized Americans would be April 2021.

While it is unclear whether or how that deadline could be enforced—and vaccination eligibility and scheduling does not mean that shots will actually get into people's arms by, or on, the end of April (that will take several more weeks for sure)—it appears that the country is on the verge of opening up the floodgates regarding vaccine availability.

More than a dozen states have already completely opened up eligibility to anyone 16 years old and older. Now that there are vaccines available from three pharmaceutical companies, and the first few priority phases and tiers have been exhausted in most states, it seems that anyone willing to get the vaccine will be able to do so in very short order. Of course, polls show that approximately 13 percent of individuals say they will “definitely not” get vaccinated and another 25 percent say they will either “wait and see” or get vaccinated “only if required.” This may help explain why supply has met (or quickly will meet and exceed) the current demand for the vaccine.

Texas is one of the states opening up eligibility to everyone over the age of 16, but Governor Greg Abbott on April 6, 2021, signed an [executive order](#) prohibiting governmental entities (and those private businesses receiving public funds) from requiring proof of vaccination for purposes of receiving any service or entering any place—whether through the use of “vaccine passports” or otherwise. According to the governor, he issued these prohibitions and protections in Texas because each person has “the option to accept or refuse administration of the product” under an emergency use authorization (like all three of the currently available vaccines) and vaccination “is always voluntary in Texas and will never be mandated by the government.” This executive order also classifies mere “vaccination status” as “private health information,” although the federal government has [explained](#) that asking or requiring employees to show proof of receiving a COVID-19 vaccination is not a disability-related inquiry under the Americans with Disabilities Act. Florida Governor Ron

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Desantis issued a similar Executive Order on April 2, 2021, but it prohibits all “businesses in Florida . . . from requiring patrons or customers to provide any documentation certifying COVID-19 vaccination . . . to gain access to, entry upon, or service from the business.” While the Executive Order does not reference “employers” or “employees,” it is not clear yet how broadly the prohibitions will be interpreted.

## Considerations for Tweaking Vaccination and “Return to Office” Policies

Even if an employer may legally require full vaccination before employees return to its offices or facilities, requiring employees to choose between a vaccine and all previously existing aspects of their jobs could still breed resentment, and risk legal action. But there is a good business case to be made for requiring full vaccination of all employees working at a worksite with other employees. The U.S. Centers for Disease Control and Prevention (CDC) recently provided guidance—[Interim Public Health Recommendations for Fully Vaccinated People](#)—and explained that fully vaccinated people need not wear masks or observe social distancing during private indoor visits with a small group of other fully vaccinated individuals (although even fully vaccinated individuals should “[a]void medium- and large-sized in-person gatherings” and continue to practice other preventative measures “in public settings”). The CDC guidance does not specifically address how to manage fully vaccinated employees in the workplace, and for the time being, existing state and local regulations regarding face coverings and other mitigation measures may still apply.

Given the above-referenced statistics and relatively high percentage of those who will oppose vaccination or receive it only begrudgingly, employers may want to consider alternatives such as continuing to allow remote working arrangements or allowing unvaccinated employees to return to their worksites under continued health and safety protocols, such as strict social distancing, masking, and quarantining.

However, other employers cannot (or may prefer not to) allow remote working arrangements indefinitely. For those employers, slowly phasing in a mandatory vaccination requirement may make sense, but such employers may also want to keep in mind reasonable accommodation requests from employees based on sincerely held religious beliefs or covered disabilities. Potential accommodations include granting exemptions from the vaccination requirement, waiting for alternative vaccine products without objectionable ingredients, or requiring additional mitigation measures, such as increased social distancing, continued use of face coverings, or reassignment to a different position or area of the workplace. Reviewing accommodation requests and engaging in the interactive process is a fact-intensive process, which often require careful consideration.

If a workplace is only open for those who have been vaccinated, knowing who is vaccinated is easy—*everyone is*! But, for those workplaces that allow both vaccinated and unvaccinated employees to return to their worksites, how do employees know who among them has been vaccinated—color-coded name badges, stickers, or other accessories? Will coworkers care if those working closely around them all day long have been vaccinated? How should employers track vaccination status, and can they? Currently, other than the Texas governor’s executive order, nothing prohibits employers from requiring proof of vaccination and (confidentially) keeping records of such vaccinations (e.g., seeing and maintaining a copy of employees’ CDC COVID-19 vaccination record cards). However, labeling (or branding) employees as either vaccinated or unvaccinated might lead to shaming, bullying, or harassment in the workplace if not properly implemented, monitored, and controlled.

The debate continues regarding whether “vaccination passports” or other types of identification

should be used to distinguish between those who have been vaccinated and those who have not. Many restaurants, bars, concert venues, fitness centers, movie theaters, theme parks, and other businesses and organizations have said they will likely start requiring proof of vaccination (or proof of the need for an accommodation) in order for people to enter their facilities and enjoy their food, products, entertainment, and services. And, currently, most employers can start doing the same (subject to prohibitions that exist in Texas, Florida, and other states that follow suit).

## Current Considerations for Employers

Employers may want to continue to communicate with employees (and continuously update them) regarding the organization's position on vaccination, remote working arrangements, and safety protocols.

Employers may want to take this opportunity to implement a voluntary vaccination policy or convert a currently voluntary policy into a mandatory policy (whether for all employees or for those subsets of employees who are allowed or required to return to work in-person). And, if the ability to return to work in-person is not sufficient to reach a desired level of vaccinations in their workforces, employers might want to [consider providing further incentives to vaccinate](#), such as monetary bonuses, gift cards, extra paid time off, or other rewards, if they have not already. However, a vaccination requirement for returning to an office or facility might incentivize employees to refuse vaccinations (or not tell their employers that they have been vaccinated) in order to continue their remote working arrangements—thus, ironically, creating a *disincentive* for getting vaccinated.

Either way, employers no longer have to worry about figuring out which employees might qualify for vaccinations under all the vague, confusing, and conflicting phases and tiers initially set up by the CDC and implemented with various tweaks by each of the states. And that is certainly great news and progress!

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