

Moving the Goal Posts—Again Navigating the Ever-Changing Landscape of Returning to the Office During Covid

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Agenda

- Legal landscape of returning to the office
- Updating your Covid policy
- Current CDC guidance
- Assessing and managing the risk of Covid-related claims
- Revisiting Covid vaccine mandates
- Considerations for mask requirements
- Remote work legal implications
- Other considerations for the post-pandemic workplace

Overview of the legal landscape of the “return” to the office movement

Vaccine mandates

- Federal Contractor mandate remains under a nationwide injunction and the case is pending before the 11th Circuit
- Supreme Court struck down the OSHA ETS (Employers with 100+ Employees) vaccine mandate. OSHA has withdrawn the temporary standard, however the ETS remains as a proposed rule while the agency focuses on finalizing a permanent COVID-19 Healthcare Standard.
- Supreme Court upheld the mandated vaccines for health care workers who work in facilities with federal funding
- Various state mandates for covered health care workers- e.g., Maine, Massachusetts, New York

Mask mandates

- Portland, ME mask mandate lifted (2/17/22)
- Boston, MA mask mandate lifted (3/5/22)
- CDC Order for masking on public transit (enjoined by court order 4/18/22, now under appeal)

Federal Guidance

- CDC Guidance re: social distancing, isolation/quarantine
- DOL Guidance re: compensability of temperature checks/health screenings, testing

Updating your Covid policy

- Policy will help provide guidance to employees in case of infection or exposure
- Option to mandate vaccines, including boosters (subject to need to accommodate legally protected rights)
- Are masks required? Are masks prohibited?
- Social distancing
- Consider treating everyone equally *versus* different rules for vaccinated and unvaccinated employees
- Drafting point: Consider making policy generally applicable to infectious disease prevention

Current CDC Guidance

- Vaccines: everyone eligible should stay up to date on vaccines, including people with weakened immune systems.
- Boosters: “**Up to date**” is defined as when you have received all doses in the primary series and one booster when eligible. 2nd booster for people >50, people 12+ years old and moderately/severely immunocompromised, People who got 2 doses (1 primary dose and 1 booster of J&J vaccine)
- Masks: everyone age 2+ should properly wear a well-fitting mask indoors in public where COVID-19 Community Level is high, regardless of vaccination status

Current CDC Guidance

- Social Distancing: (Indoors in public) people not up to date on Covid vaccinations should stay at least 6 feet away from other people
- Testing: Test 5 days after exposure to COVID-19 (regardless of symptoms) regardless of vaccination status. (If not up to date on vaccinations, quarantine for these 5 days, if up to date, no need to quarantine). Regardless of vaccination status, if you test positive, isolate for 5 days if you are fever-free for 24 hours (without the use of fever-reducing medication) and your symptoms are improving. If you got very sick from COVID-19 or have a weakened immune system, you should isolate for at least 10 days.

Does an employer's Covid policy have to track the CDC's recommendations?

- CDC guidance provides a plan to follow
- CDC guidance is not mandatory
- CDC guidance can serve as the “standard of care”
- What happens if the CDC guidance conflicts with other legal obligations or business necessities?

Risk Analysis of Covid-related claims

- Who will sue you?
 - Customer
 - Guest
 - Employee
 - Student
 - Family member of customer, employee, student
 - Government agency- e.g., OSHA

Risk Analysis of Covid-related claims

- What is the claim?
 - Customer, guest, student claims they got covid infection due to the negligence of company
 - Employee claims she got covid infection due to exposure at work
 - Employee claims he was unlawfully denied accommodation for medical or religious reasons
 - Employee claims she was injured from a vaccine mandated by employer
 - OSHA cites the employer for failing to provide safe workplace

Risk Analysis of Covid-related claims

- What is your exposure?
 - If claim arises out of negligence, then following the CDC guidance can provide a defense to liability as the **standard of care**; e.g., customer, guest, student
 - These claims can be difficult to prove
 - Standard of care in 2020 likely different than in 2022
 - If claim based on refusal to accommodate an employee's medical condition or religious belief, following CDC guidance could provide basis for a defense
- EEOC standard for rejecting accommodation for medical condition:
 - “reasonable belief, based on objective evidence, that an employee will pose a direct threat to the health of safety of herself or others.”
- Is the CDC's guidance the same as “objective evidence”?

Risk Analysis of Covid-related claims

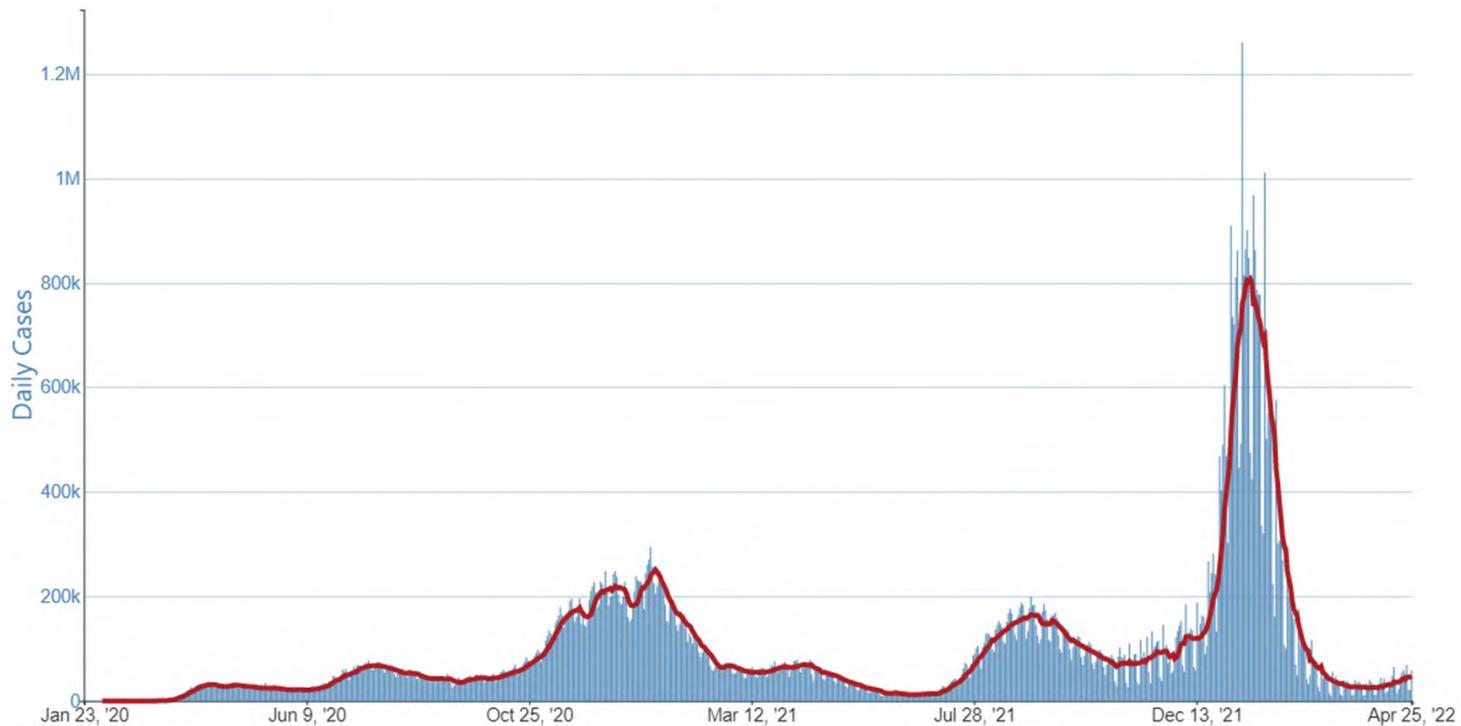
- Do you have insurance?
 - General liability for negligence
 - EPLI for employment claims
 - Workers' compensation will likely be the exclusive remedy for employees who get Covid from work exposure and employees injured from mandated vaccine—(probably)
 - What is your deductible and your coverage limit?
- What is your likelihood of getting sued?
- What is the potential damage to your reputation with a claim?
- Which type of claim would you rather defend?

Considerations for Adjusting Vaccine Requirements

- Sentiment around vaccine mandates- reduce risk of liability
 - Based on belief that vaccines prevented infection, transmission, and severity of symptoms
 - have they shifted?
- Claims against companies by employees and customers for contracting covid due to company's negligence have been rare
- Will some employees be anxious or angry if mandates are dropped?
- Will employees who were fired for refusing the vaccine be reinstated if the mandate is dropped?
- Is dropping the mandate an admission that any requests for medical or religious accommodation were wrongly denied?

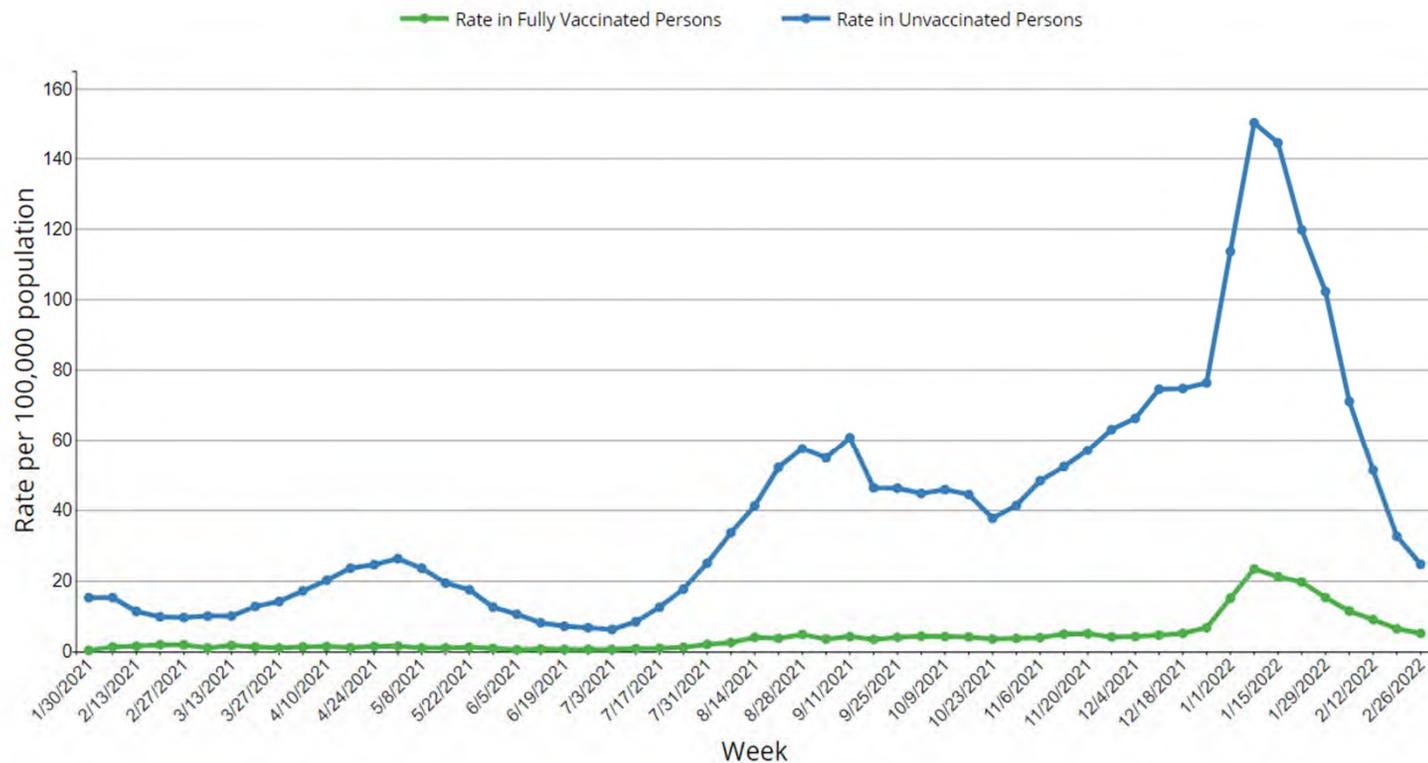
Data relevant to vaccine mandates

Daily Trends in Number of COVID-19 Cases in The United States Reported to CDC



Data relevant to vaccine mandates

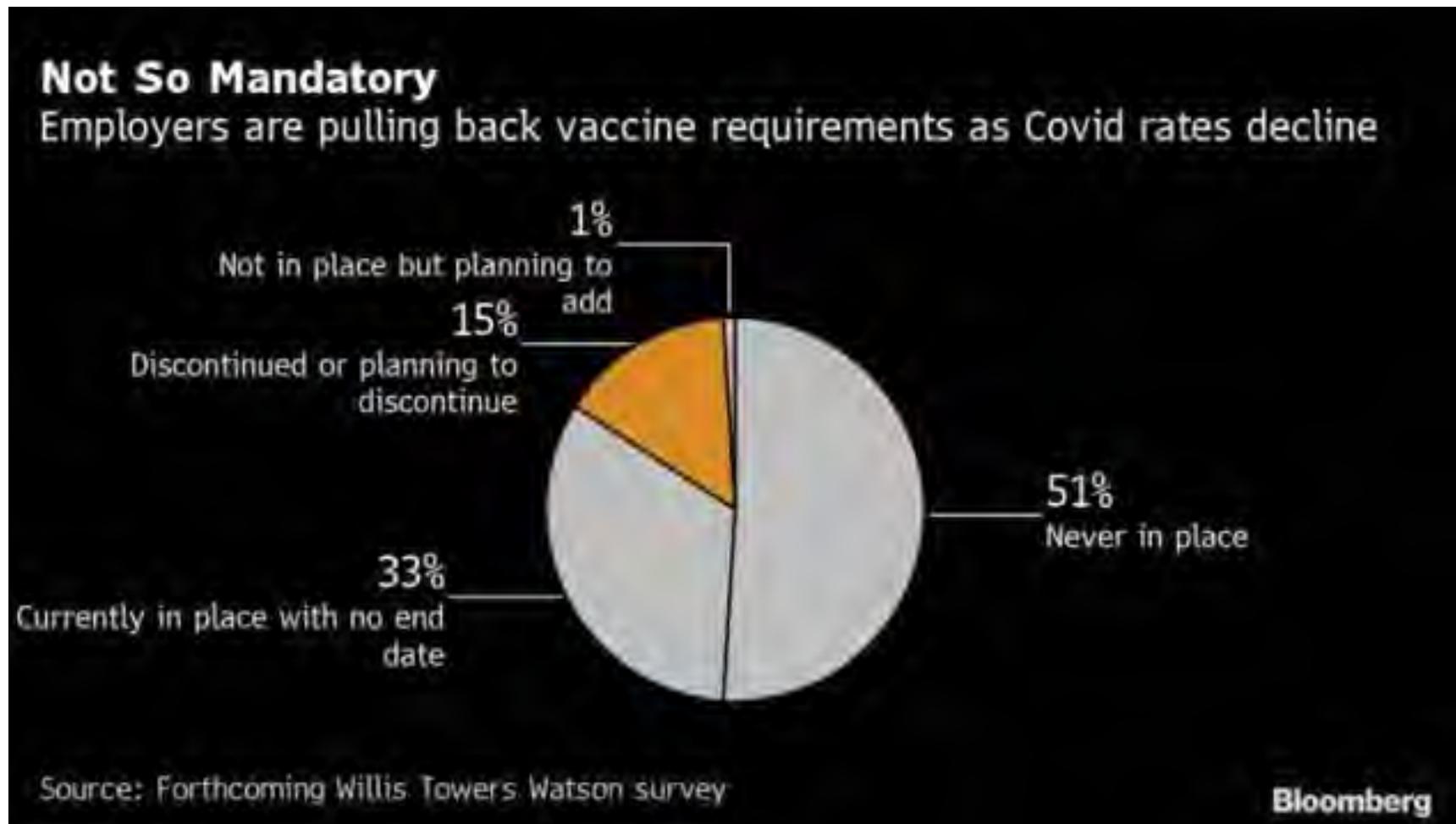
Age-Adjusted Rates of COVID-19-Associated Hospitalizations by Vaccination Status in Adults Ages ≥ 18 Years, January 2021–February 2022



Data relevant to vaccine mandates

- CDC reports that 60% of U.S. population (including 75% of children) show signs of Covid-19 infection as of February 2022 (4/26/22)
- During March 2022: 60% of cases in Massachusetts and 88% of cases in Maine were fully vaccinated

How many employers are mandating Covid vaccine?



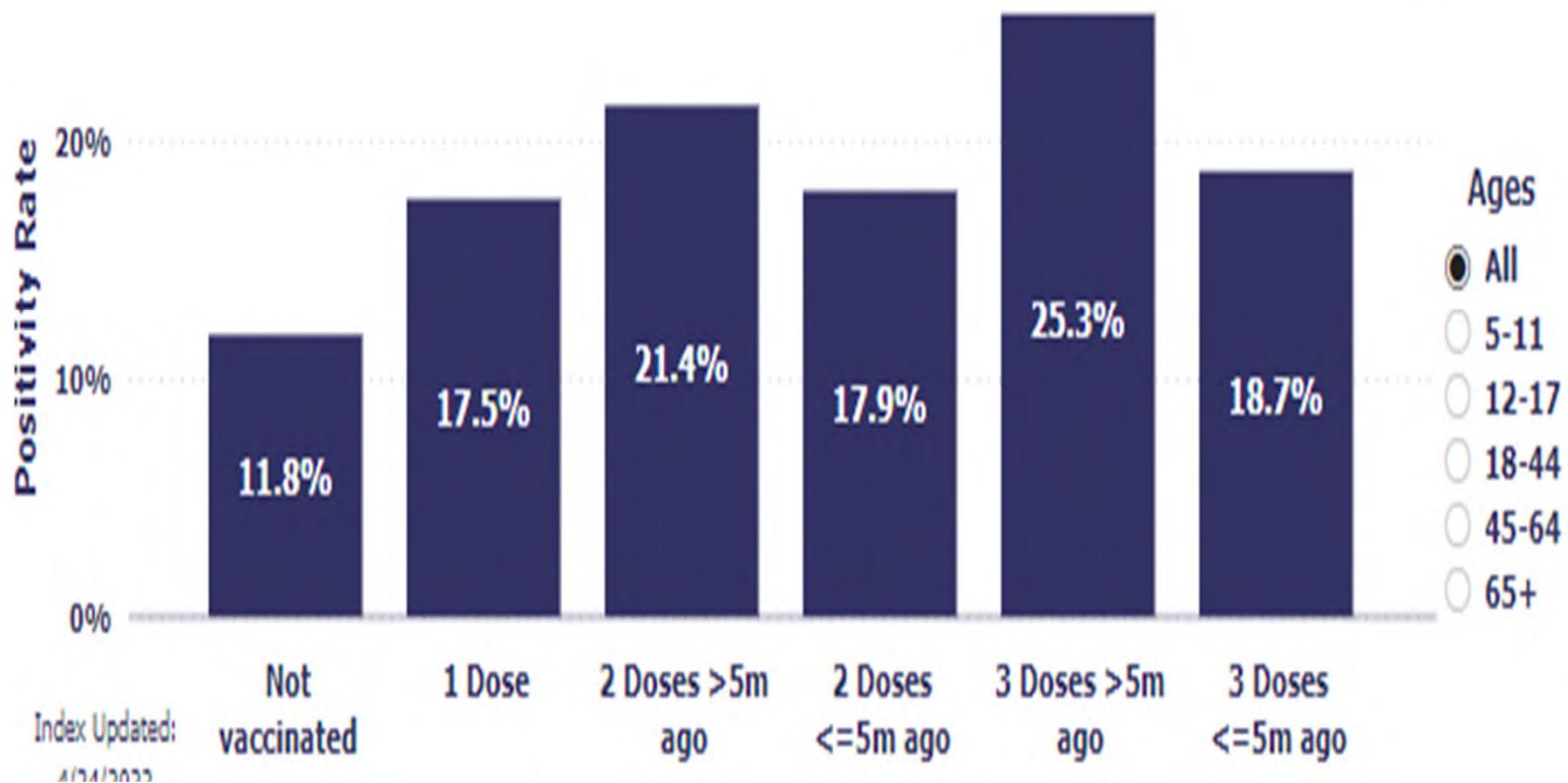
Vaccine Requirements- relevant data Walgreen's Covid-19 Index

<https://www.walgreens.com/businesssolutions/covid-19-index.jsp>



Positivity Rate by Vaccination Status 04/16/2022 - 04/22/2022

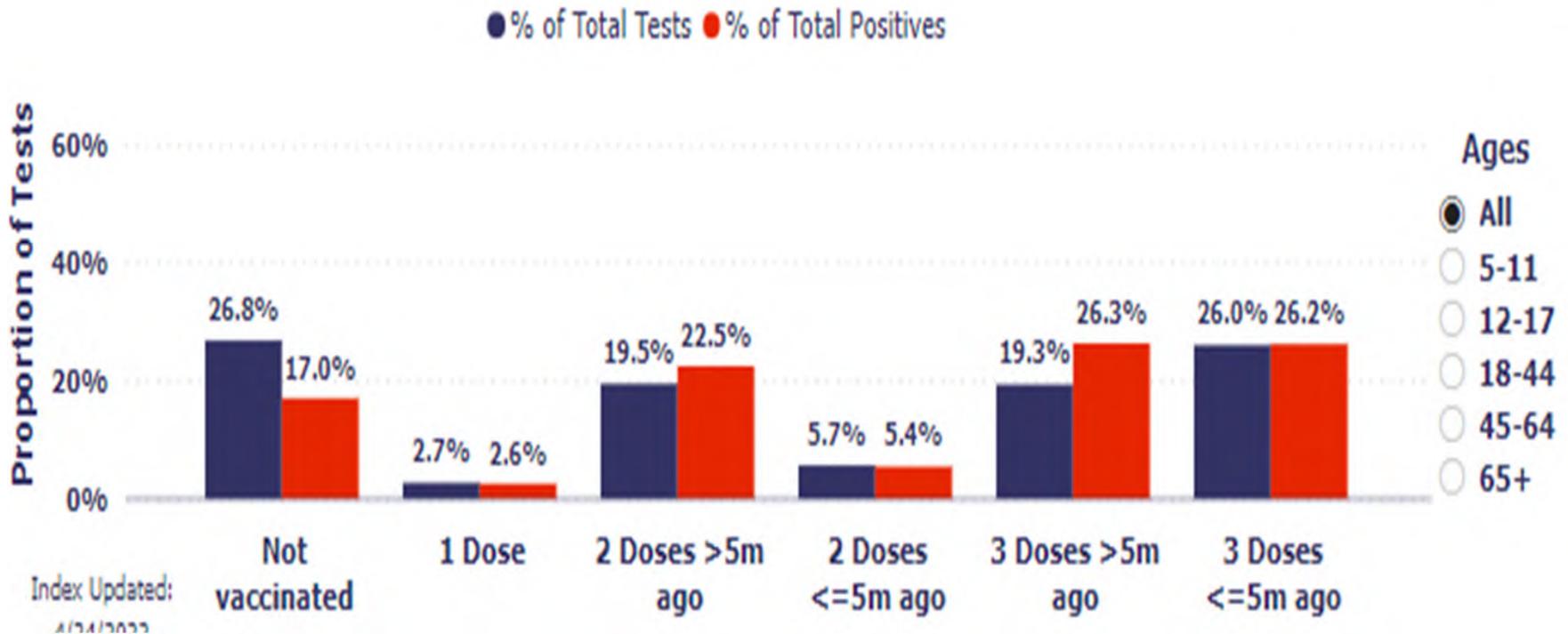
- Positivity Rate
- Proportion of Tests



Vaccine Requirements- relevant data Walgreen's Covid-19 Index

i Proportion of Tests by Vaccination Status 04/16/2022 - 04/22/2022

- Positivity Rate
- Proportion of Tests



Possible takeaways from the Walgreen's data

- Assumption that unvaccinated people pose a greater risk of infection than vaccinated people is in question (at least for Omicron variant)
- Booster shots show limited effect (at least for Omicron variant)
- Reliance on CDC guidance that is based on older data is less likely to be persuasive to a customer, an employee, or a court
- Important to recognize Walgreen's data is just one dataset
 - Not a randomized study
 - Doesn't address possible benefit of reduced symptoms
 - Public health authorities have access to different data
- **BUT:** Walgreen's data could support conclusion that the risk of claims from allowing unvaccinated workers is now less than one year ago

Considerations for Mask Requirements

- Can an employer require employees to wear a mask?
 - An employee may reasonably refuse to wear a mask if
 - the mask creates a hazardous or unsafe working environment (for example, if the mask prevents an employee from smelling or seeing a hazard); or
 - if the mask aggravates a medical condition.
- Can an employer require employees to NOT wear a mask?
 - It depends.
 - CDC recommends that individuals wear masks and practice social distancing at work. Employees who refuse to not wear a mask could have a cognizable legal claim against the employer under failure to provide safe workplace.
 - An employee with a documented disability (that is aided by or necessitates the wearing of a mask) would have an even stronger claim.

Remote work legal implications

- Remote work as a reasonable accommodation-much harder for employers to claim it is an undue hardship
- If employees are engaging in remote work, where are they working? What employment laws apply there?
 - Ex. meal and rest breaks, worker classification, leave laws
- Other requirements for your business
 - Business registration (state laws vary on the amount and types of activities that trigger the need to register your business)
 - Taxable presence or nexus
 - Employment taxes and payroll deductions

Employee relations trends for post-pandemic workplace

- Mask shaming
- Rejoining colleagues in the workplace
- Inappropriate “welcome back” comments
- Hybrid workforce
 - Surveys suggest remote work, at least part of the time, is permanent
 - Employee retention now depends on offering permanent work from home option for many jobs
 - Modifications could include a shortened work week to 4 days by demand or statute
 - Hoteling of offices more common

Questions?