



# What Now? COVID-19 Vaccination's Ever- Shifting Compliance Landscape

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**Seyfarth Shaw LLP**

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# Agenda

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<b>03</b>	CMS regulation - who is covered and how to comply?
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# Status of Stay and Legal Challenges to OSHA's ETS

- On January 13, 2022, U.S. Supreme Court stayed enforcement of OSHA's COVID-19 Vaccination and Testing ETS, holding: "Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate."
- OSHA cannot currently enforce its ETS and decided to withdraw the standard on January 25, 2022.
  - OSHA explicitly stated that ETS remains as a proposed rule for a permanent standard.





# Status of Stay and Legal Challenges to OSHA's ETS

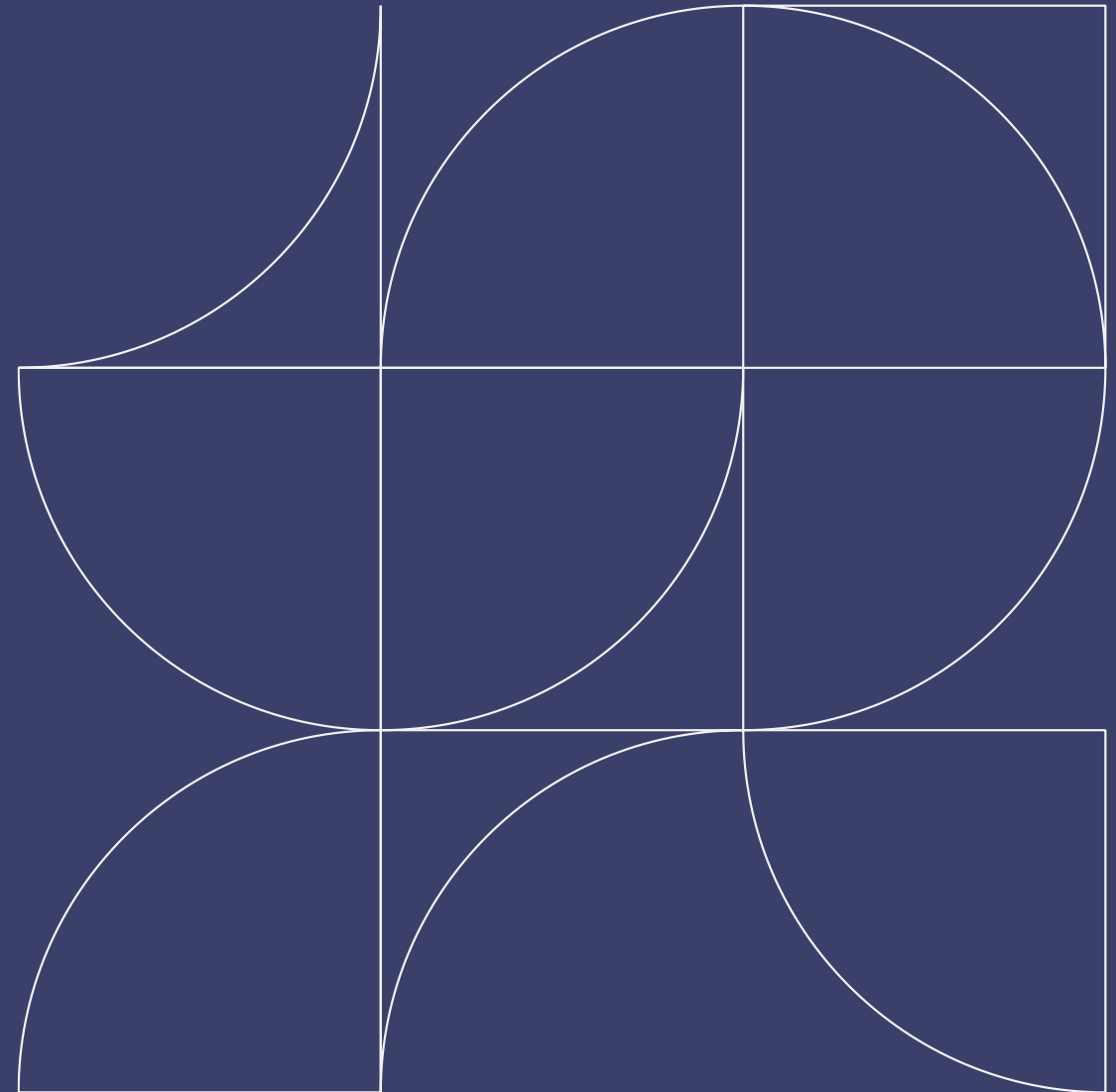
- Employers not precluded by the decision from implementing their own mandates, but must consider what will work in their workplaces and workforces in deciding whether to do so.
- Secretary of Labor Marty Walsh immediately expressed disappointment in the Supreme Court decision and urged employers to mandate vaccination or weekly testing, advising that “[r]egardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers.”

## Status of Stays and Legal Challenges to CMS Regulation



- On Monday, November 29, 2021, the U.S. District Court for the Eastern District of Missouri blocked the CMS vaccination mandate in Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming.
- The next day, the U.S. District Court for the Western District of Louisiana issued an additional preliminary injunction suspending the CMS regulation in the remaining 40 states.
- On December 15, the U.S. Court of Appeals for the Fifth Circuit narrowed the Louisiana injunction to apply to only the 14 states that brought the challenge.
  - Also on December 15, the U.S. District Court for the Northern District of Texas stayed the CMS regulation in Texas, making Texas the 25<sup>th</sup> state where the regulation was enjoined.
- Supreme Court heard oral argument on emergency stay applications on January 7, 2022.
- Stay lifted by Supreme Court on January 13, 2022

# What's next from OSHA?





# Status of OSHA COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS)



- OSHA Health Care ETS Expired December 21, 2022
  - Ongoing ETS or similar requirements in some state plans (e.g. TN)
- OSHA Vaccination and Testing ETS withdrawn by OSHA on January 25, 2022
- 21 OSHA state plans governing private employers have not released vaccinate or test rules
- Vaccination and Testing ETS still on file as potential permanent standard, infectious disease standard
- Potential that OSHA may release limited standard, requiring vaccination roster, masking by unvaccinated, distancing by unvaccinated

# OSHA COVID-19 Enforcement

- OSHA General Duty Clause requires employers to provide workplace free from “recognized hazards”
- Reliance upon CDC, NIOSH as authority
- OSHA has issued COVID-19 guidance for general industry and construction  
<https://www.osha.gov/coronavirus/safework>

# OSHA COVID-19 Enforcement

- OSHA citations and monetary penalties
  - Willful citations related to COVID-19 protocols, including masking
  - Respiratory protection standard
    - Contact with symptomatic or persons under investigation
    - Written respiratory protection program elements
  - Record-keeping violations, including failure to report fatalities
- Publicly available information
  - OSHA establishment search
  - Press releases
  - List of COVID-19 violations

# OSHA Guidance Relating to Vaccination



- Facilitate employees getting vaccinated
  - Grant paid time off for employees to get vaccinated and recover from any side effects.
- Quarantine for unvaccinated employees (note CDC's revised guidance)
- Physical distancing in all communal work areas for unvaccinated
- Masking (CDC guidance includes unvaccinated)
- Training on COVID-19, Including Vaccination
- Suggest or require that unvaccinated visitors mask.

# Key Employer Tools and Options

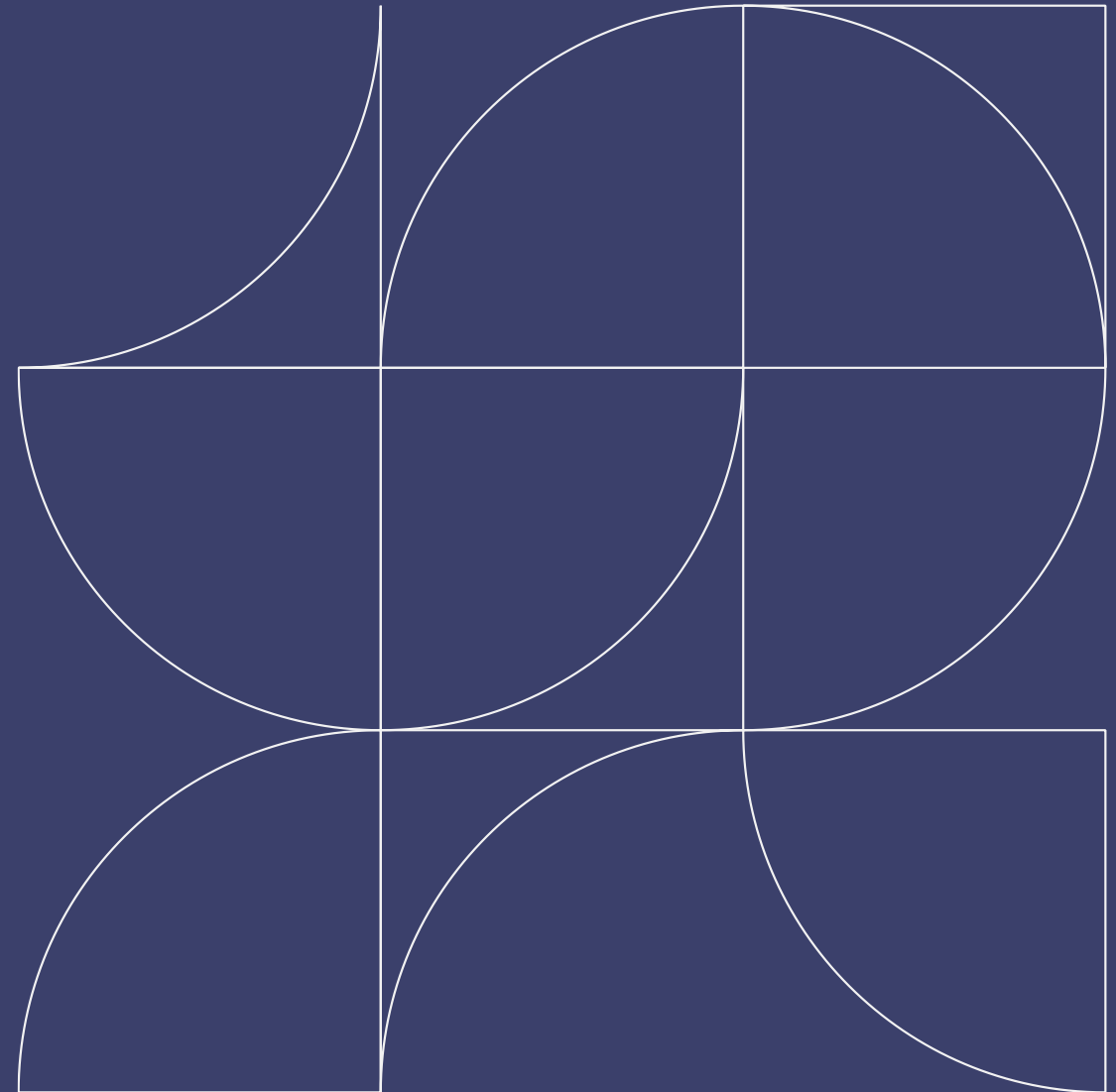
- Vaccine verification
  - “hard” mandate
  - “soft” mandate
  - documentation
  - card check
  - roster
  - honor system
- Wellness screenings
  - management-directed, temperature screening
  - self-screening
  - isolation training
- Visitor policies
  - restrictions
  - masking
  - training / signage

# COVID-19 in the Biden Administration

- Safety and Health Complaints
  - Responding to complaint letters
  - Onsite inspections
- OSHA Whistleblower
  - OSHA whistleblower protection, Section 11(c)
  - Employees not required to work if imminent danger



# CMS regulation - who is covered and how to comply?



# September 9, 2021 COVID-19 Action Plan – CMS Overview



- Centers for Medicare & Medicaid Services (“CMS”)
  - Health care facilities must have vaccination policy by December 6, 2021.
  - Health care employees must be vaccinated by January 4, 2022.
  - As of December 17, 2021, stayed in 25 states.
  - As of January 13, 2022 – Supreme Court lifted stay



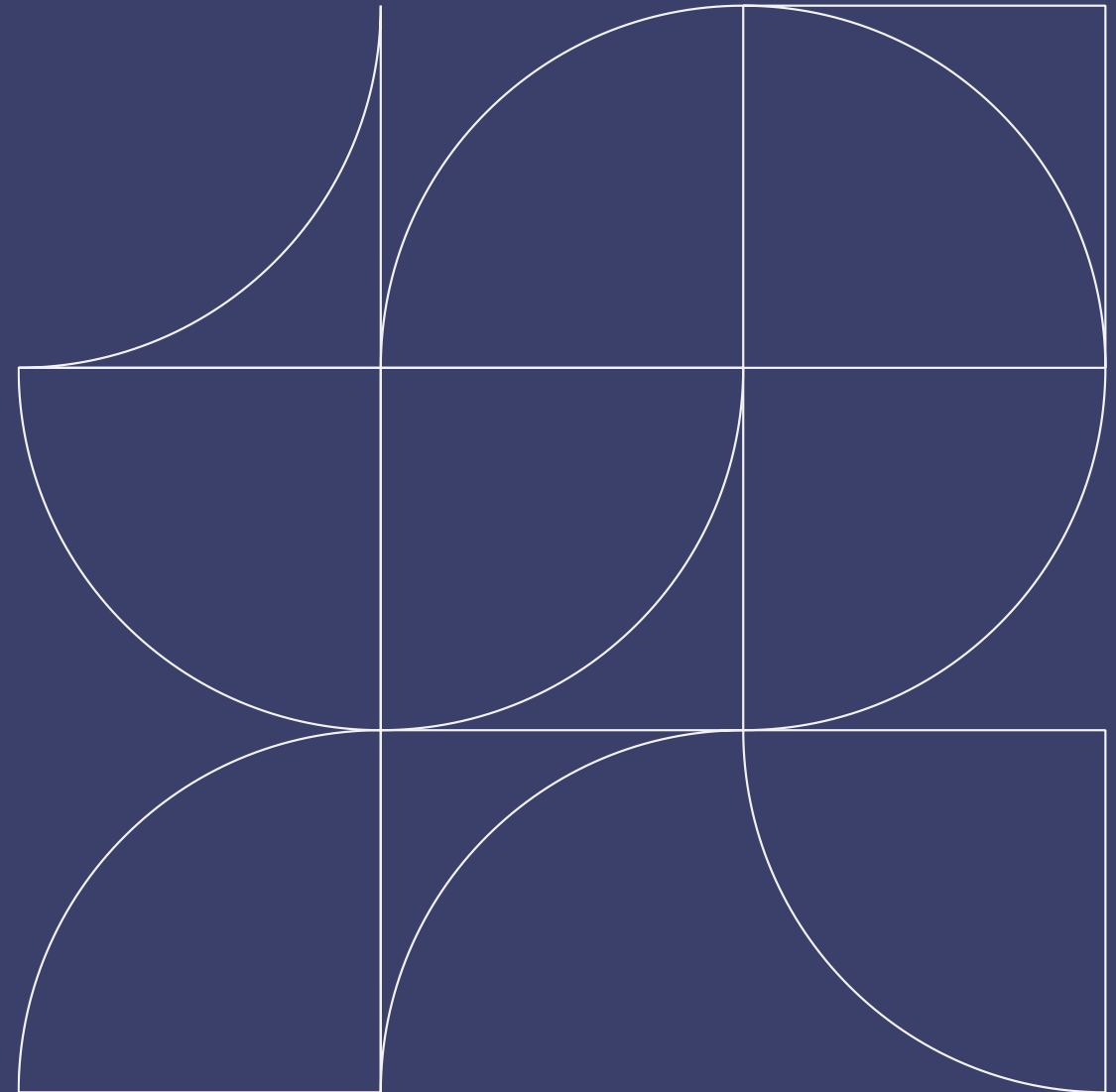
## CMS Health Care Staff Vaccination Mandate

On November 5, 2021, HHS published its [vaccine mandate](#) covering all eligible staff who work at health care facilities participating in Medicare and Medicaid.

On January 14, 2022, CMS Issued Guidance updating dates for Compliance for those states that challenged CMS.

- Necessary shots to be completed by March 15, 2022.
  - By February 13, 2022, covered facilities must establish a policy ensuring that all eligible staff received the first dose of a two-dose COVID-19 vaccine or a one-dose COVID-19 vaccine prior to providing any care, treatment, or other services.
- Acceptable proof of vaccination includes:
  - CDC COVID-19 vaccination record card (or a legible photo of the card);
  - Documentation of vaccination from a health care provider;
  - Electronic health record; or
  - State immunization information system record.

# State and local responses

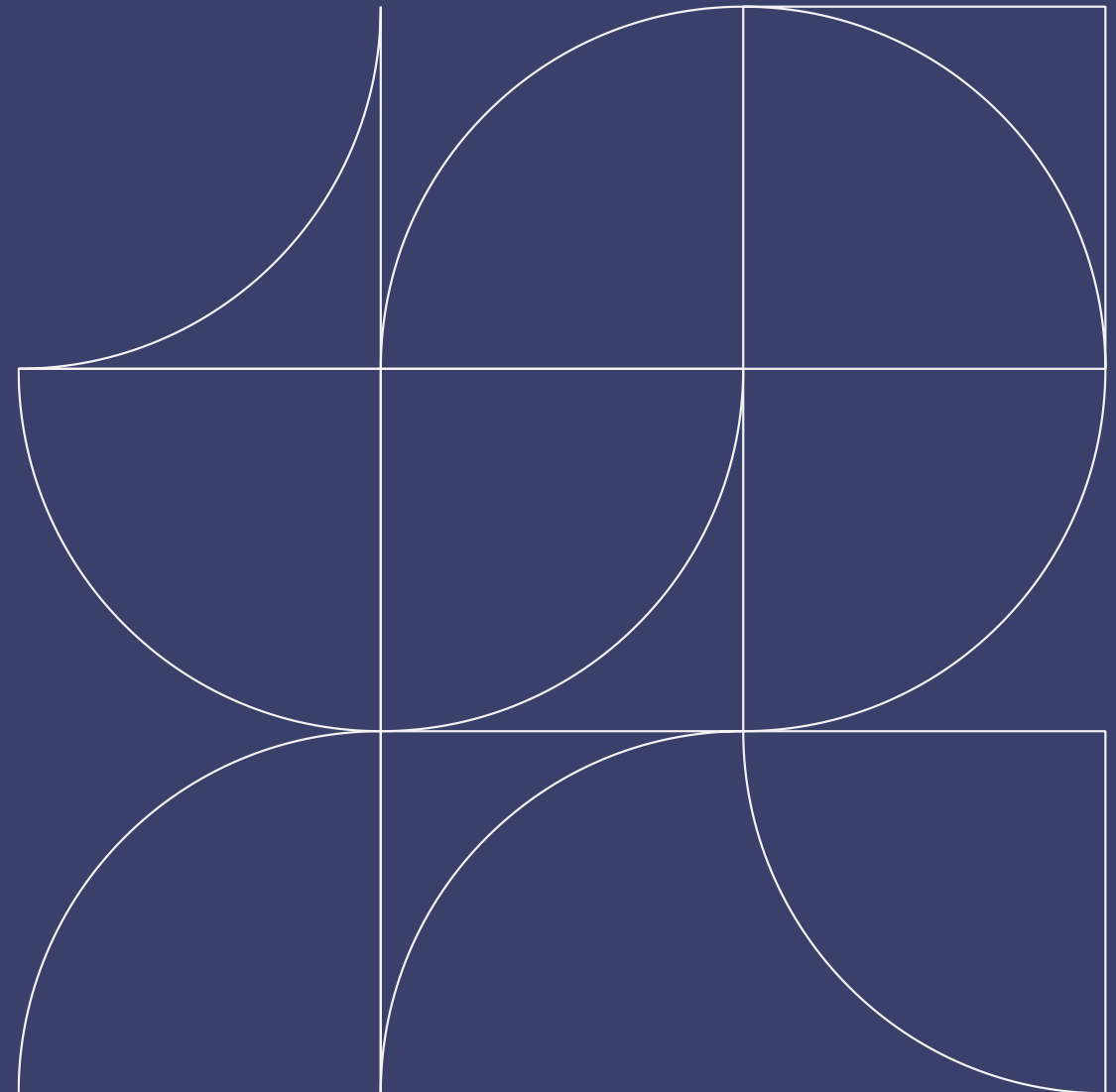


# Vaccination Compliance – State Law Concerns



- Various states and municipalities have passed various vaccine mandates and anti-mandate laws that make navigating compliance considerations tricky, especially for national and multi-state employers.
  - Some laws provide broader accommodation request rights (i.e., KS)
  - Some laws require testing as an alternative (i.e., FL)
  - Some laws prevent discrimination against someone for their vaccination status (i.e., MT)
  - Some laws prohibit mandating the disclosure of one's vaccine status (i.e., TN)
  - Other bills pending (i.e., IN expected to pass something soon)

# Federal contractor mandate – status of litigation and what should contractors do?





# Status of Stays and Legal Challenges to Contractor Mandate



- Nationwide injunction issued Dec. 7, 2021 S.D. GA
- Four other Fed. Courts have issued geographically / party limited injunctions
  - E.D. KY (KY/OH/TN)
  - W.D. LA (very limited scope – contracts between the states of LA, MS & IN and feds)
  - E.D. MO (MO, NE, AK, AR, IA, MT, NH, ND, SD, WY)
  - M.D. FL (FL)
- Appeals Pending in 5<sup>th</sup> (LA), 6<sup>th</sup> (KY), 8<sup>th</sup> (MO), and 11<sup>th</sup> (GA) Circuits
  - 6<sup>th</sup> and 11<sup>th</sup> Circuits denied stays on injunctions pending appeal
    - No decision from either court likely before March/April

# Status of Stays and Legal Challenges to Contractor Mandate



- GSA guidance following injunctions
  - Federal agencies should not require the contractor to fulfill the requirements outlined in the SFWTF guidance
    - Vaccination of covered contractor employees;
    - Requirements related to masking and physical distancing while in covered contractor workplaces; and
    - Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.
  - GSA contractors will continue to be eligible for new contracts, new orders, options, and extensions even if they have not agreed to follow FAR clause 52.223-99
- DoD Class Deviation Revision following injunctions
  - shall not include the clause in new solicitations
  - shall not enforce the requirements of the clause in existing contracts, task orders, and delivery orders.
  - shall not include the clause in new contracts or orders
  - shall not amend existing contracts or orders to incorporate the class deviation clause

# Status of Stays and Legal Challenges to Contractor Mandate



- SFWTF Guidance following injunctions:
  - **For existing contracts or contract-like instruments (hereinafter “contracts”) that contain a clause implementing requirements of Executive Order 14042:** The Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, “Excluded State or Outlying Area”). In all other circumstances, the Government will enforce the clause, except for contractor employees who perform substantial work on or in connection with a covered contract in an Excluded State or Outlying Area, or in a covered contractor workplace located in an Excluded State or Outlying Area.

# Status of Stays and Legal Challenges to Contractor Mandate



- Nationwide injunction quasi-clarified by GA court on Jan 21, 2022
  - “Defendants are **ENJOINED** . . . from enforcing the *vaccine* mandate . . . .”
  - “the Court’s Order on the Motion for Preliminary Injunction did not reference, discuss, or analyze any of the other COVID-19 safety-related requirements.”

# Status of Stays and Legal Challenges to Contractor Mandate



- What comes next?
  - Will Feds change guidance following GA quasi-clarifying order?
  - Judicial review ultimately by SCOTUS
    - When?
    - What do ETS and OSHA decisions signal?
  - Formal rulemaking action by FAR Council?
  - Withdrawal and claim victory?
- Vax or test site access restriction for federal facilities
  - have/are being rolled out
  - not impacted by injunctions
  - similar to ETS, but only impact persons entering a federal facility
    - differ by facility/agency, but most common = Vax or 72hr test

# What Contractors Should do While Litigation is Pending



- Get ducks in order in case injunctions lifted
- Collect vax status info from employees
- Be watchful for contract/subcontract amendments that include the vax clause
- Identify strategies to limit spread of the mandate that can be implemented if injunctions lifted
- Be prepared to quickly implement non-vax SFWTF requirements if Gov't changes guidance based on GA quasi-clarification



**Thank you for  
attending**

