

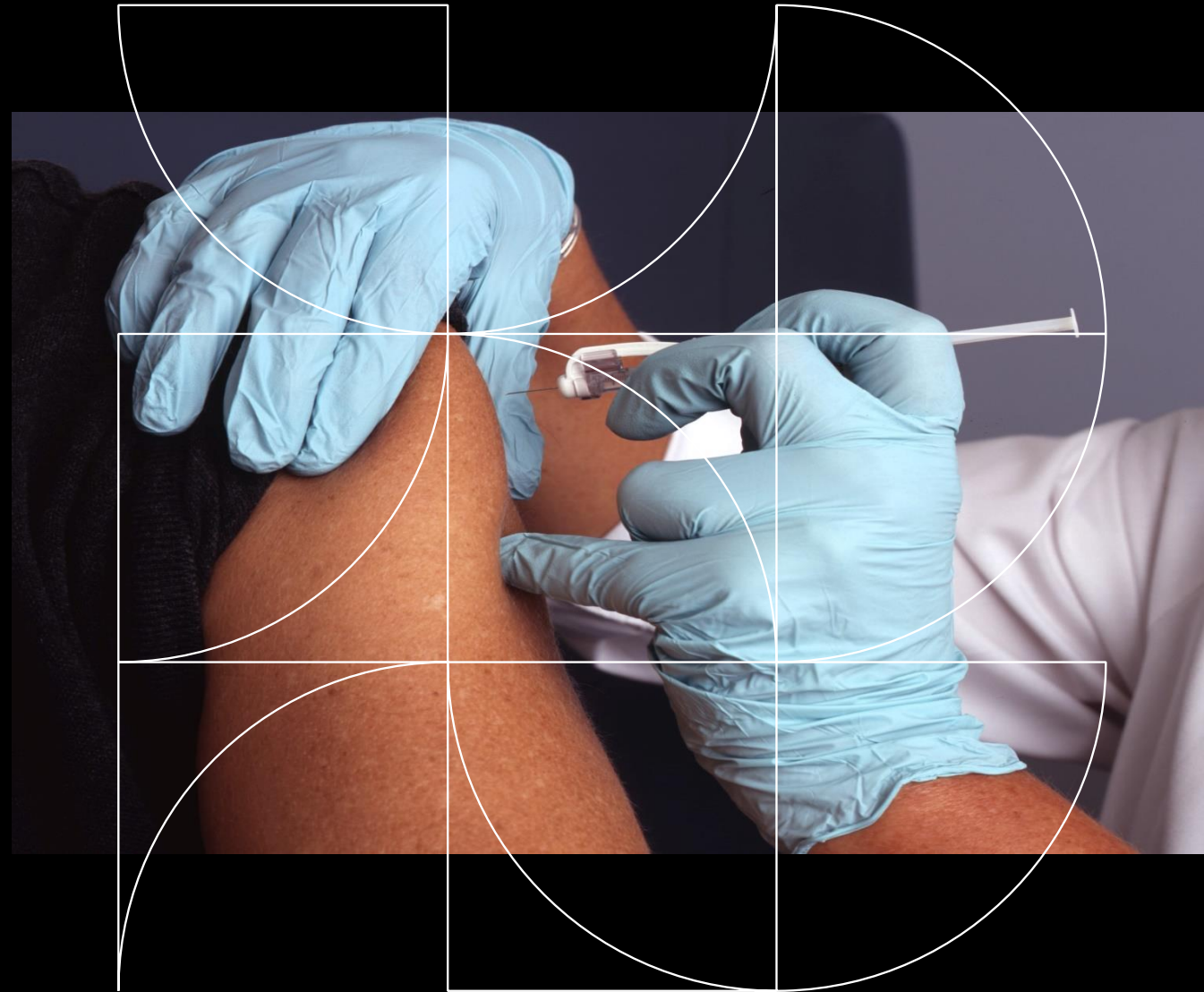


Vaccine Policy for Employers and the Implications of the Federal Mandate

September 17, 2021

Seyfarth Shaw LLP

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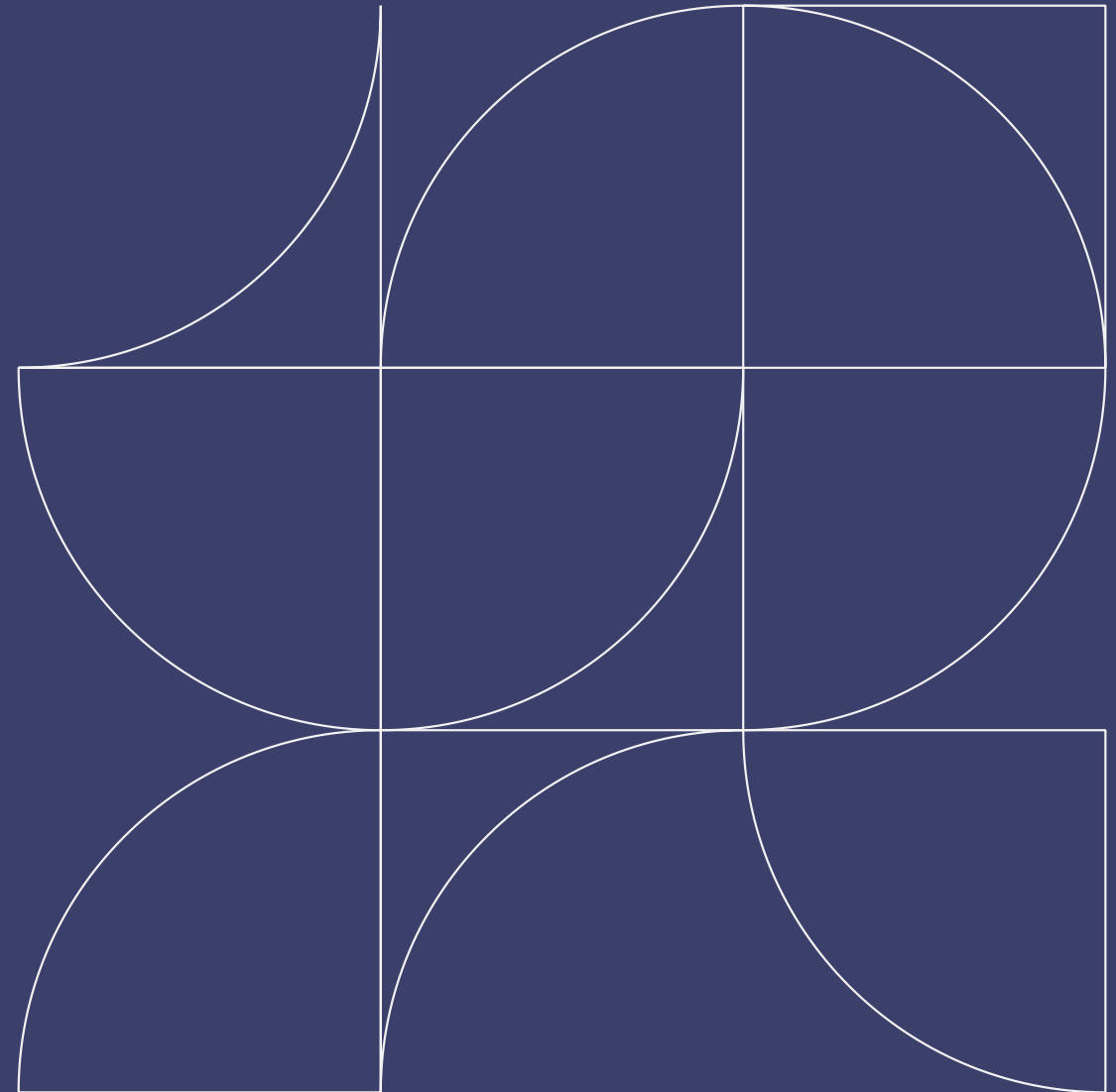


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Agenda

- 01** Vaccine Mandates and What They Mean
- 02** Legal Challenges
- 03** Policy Considerations
- 04** Accommodations Strategies

Vaccine Mandates and What They Mean



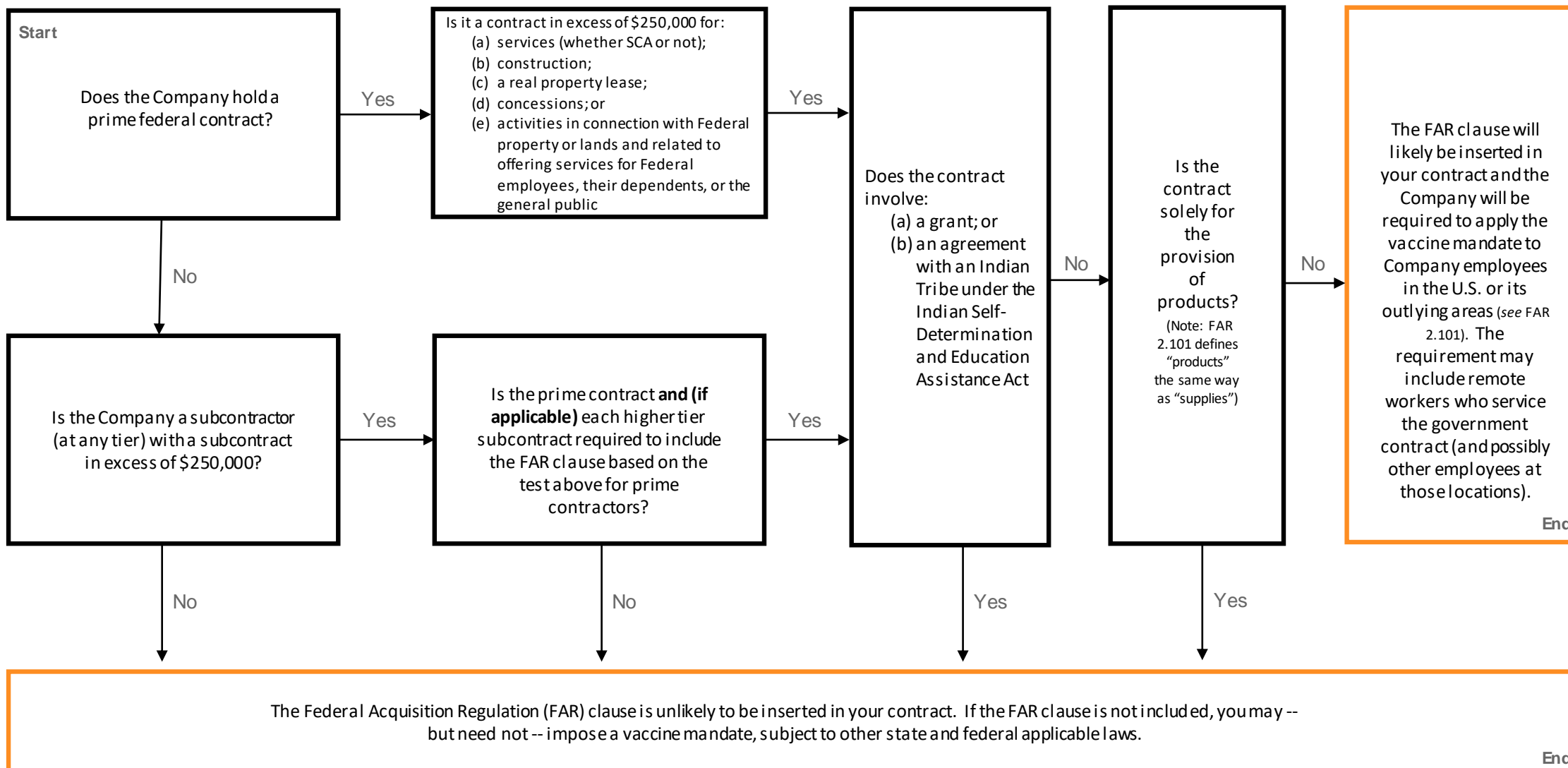
Biden Mandates

Overview

- Federal Workers
- Federal Contractors
- OSHA ETS – Employers with 100 or More Employees

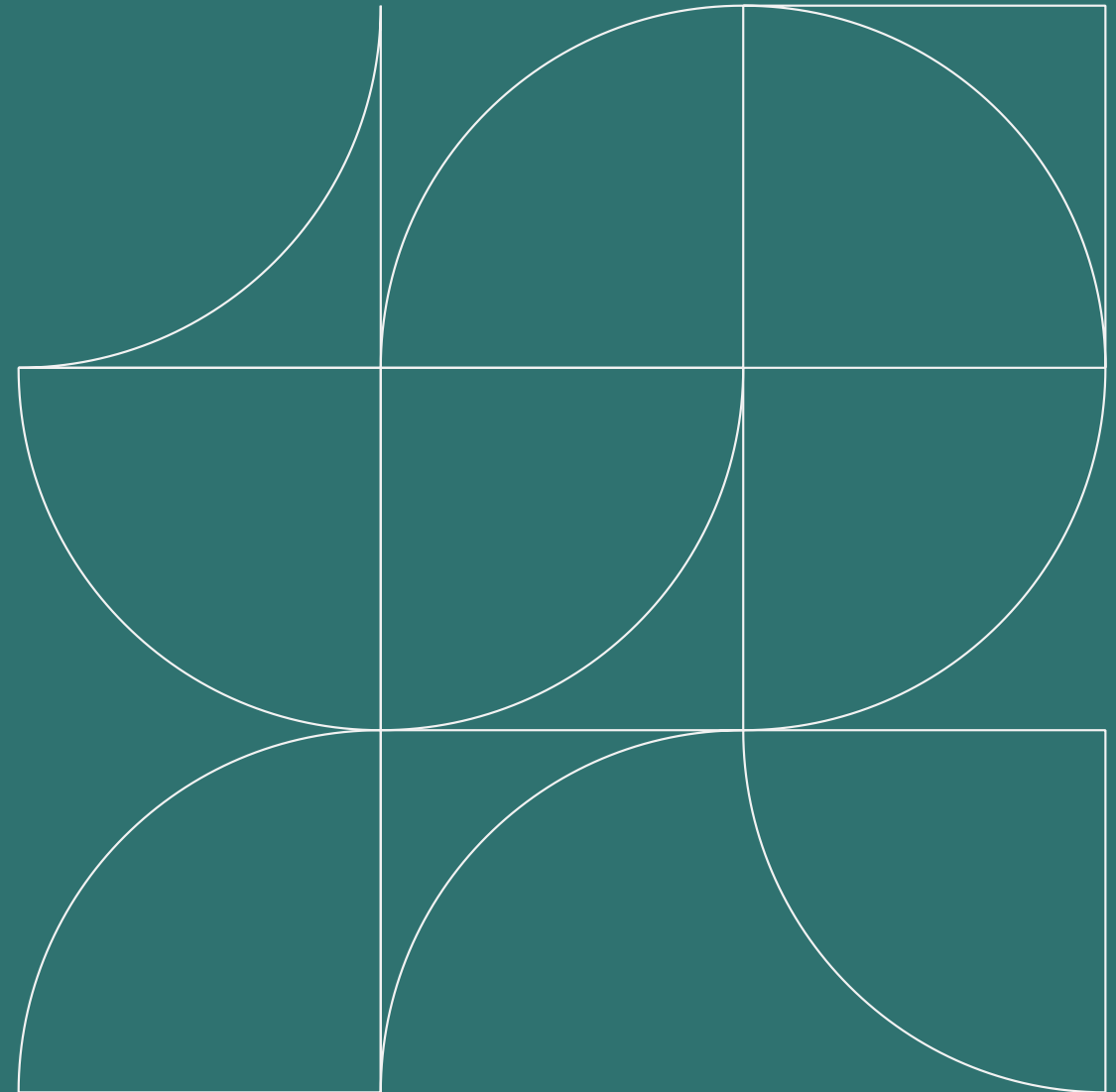
Overview of Proposed ETS

- All employers with 100 or more employees will have to require workers:
 - Are vaccinated; or
 - Undergo weekly COVID-19 testing
- Employers have option to require vaccinations with no testing option
 - must permit for accommodations
- Employers / employees covered
 - “100 or more employees” will be counted company-wide, not by worksite
 - Will likely include seasonal employees (employer should count peak employment during prior year)
 - The ETS will **not** apply to employees who never come in to work (i.e., **fully** remote)
 - Will apply to employees who come into work (even once) or who work outside the office with others
- Proof of vaccination will likely be met with attestation
- Employers will have to provide time off for vaccination



*These considerations are based on the September 9, 2021 Executive Order. They may be refined or clarified in the upcoming Safer Federal Workforce Task Force guidance expected by September 24, 2021, and the FAR rules, expected by October 8, 2021.

Legal Challenges



Understanding the ETS Mechanism

Traditional Rulemaking

vs.

Emergency Temporary Standard

- OSHA required to provide (1) formal notice of proposed rule (NPRM); and (2) opportunity for public comment
- Average time between NPRM and final rule is over 3 years
- Remains in place until modified or retracted through future regulation

- Permitted when:
 - Employees exposed to “**grave danger**” from exposure to toxic or harmful substances/agents, or from new hazards; and
 - Emergency standard “**necessary** to protect employees from such danger”
- Expires after 180 days

What's Next for the ETS

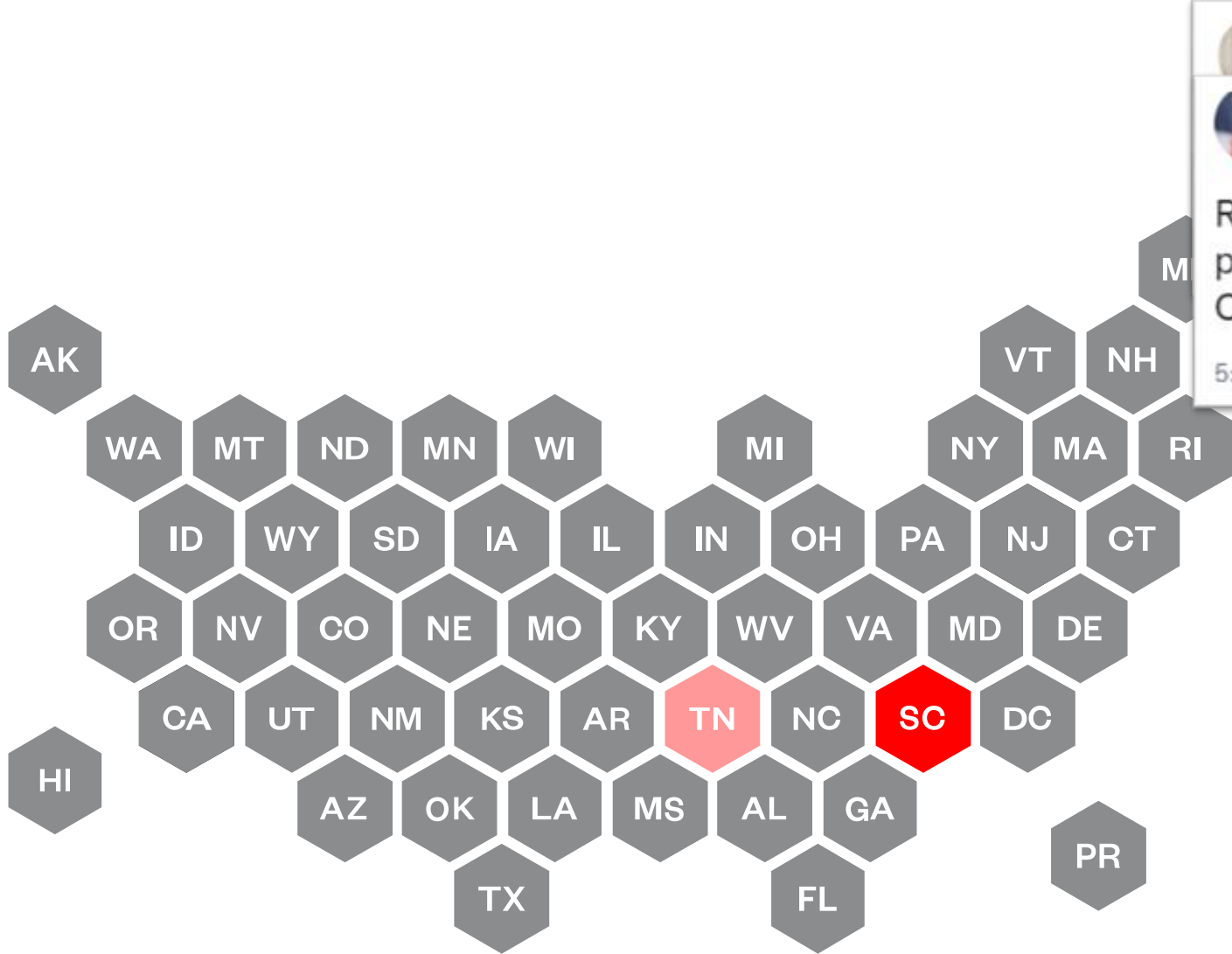
- ETS will be issued in “coming weeks”
 - Health care ETS took six months from announcement to becoming effective
 - Biden Administration seems to have a faster process in mind
- Immediate effect in 29 states where federal OSHA has jurisdiction
 - Health care ETS phased in requirements at 15, 30 days
 - Note that Montana, Florida, and Texas are all covered by federal OSHA
- OSHA state plans will have 30 days to adopt similar or more restrictive rule

Questions and Tea Leaves

Topic	Questions	Tea Leaves
Coverage	100 employees at a site or company-wide?	OSHA official has indicated company-wide
	How do remote workers factor in?	Won't apply to fully remote
Vaccination	What proof must employers obtain?	Health care ETS required employee to report positive
	PTO?	Required for injections and side effects, but particulars are unclear
Weekly Testing	Which tests qualify?	Health care ETS required PCR; broader Biden plan references rapid from Amazon, Kroger, Target
	What proof must employers obtain, keep?	Health care ETS required log of positive results
	Who pays?	Health care ETS said employer, but not clear now
Enforcement	OSHA logs?	Health care ETS required maintenance of logs of diagnoses for onsite workers
	Fines per site or per person? Willful?	Pres. Biden referenced \$14k fine for serious violations

Will It Be Challenged?

(Yes.)

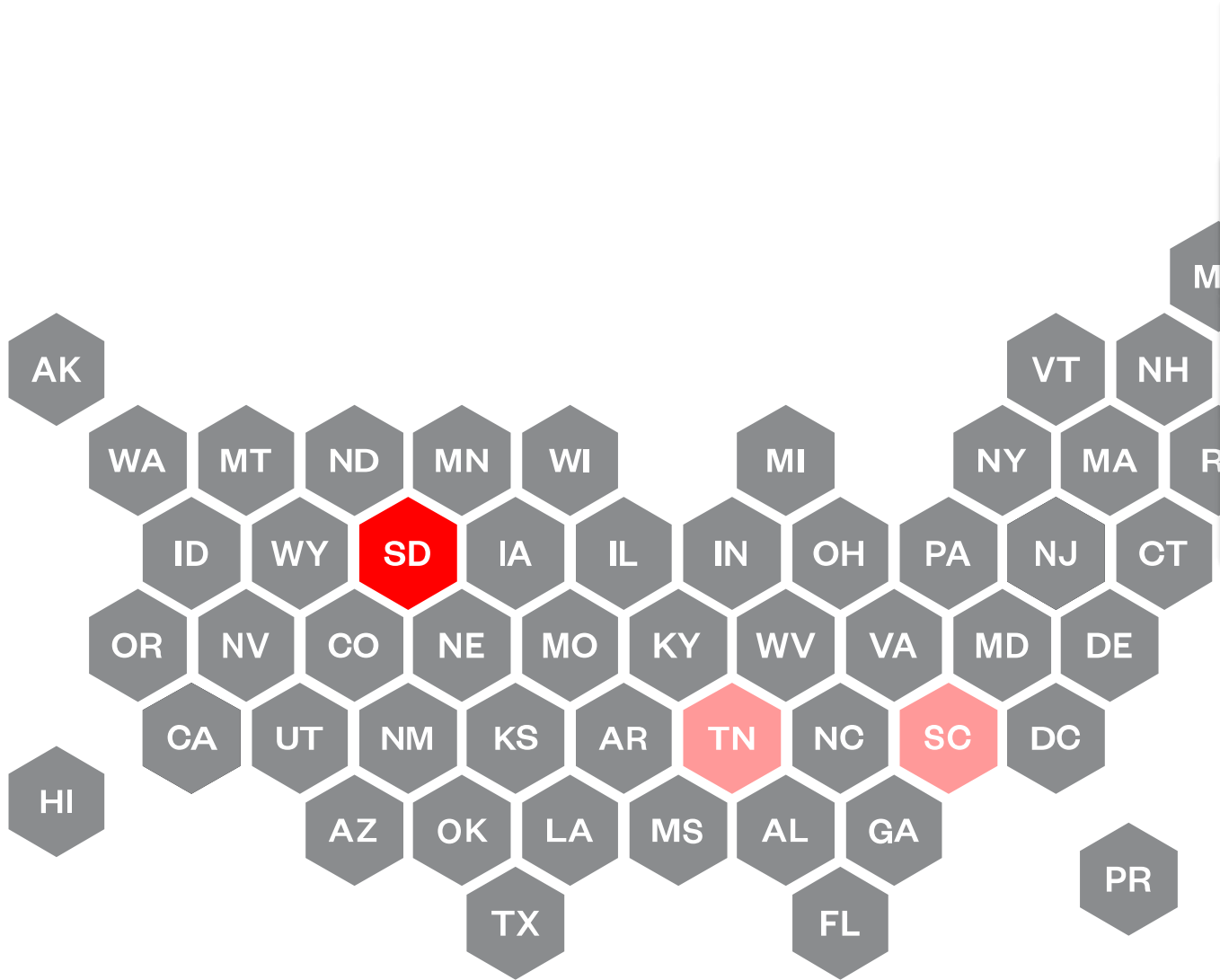


 **Gov. Bill Lee** ✓
@GovBillLee

 **Gov. Henry McMaster** ✓
@henrymcmaster

Rest assured, we will fight them to the gates of hell to protect the liberty and livelihood of every South Carolinian.

5:12 PM · Sep 9, 2021 · Twitter for iPhone



 **Gov. Bill Lee** ✓
@GovBillLee

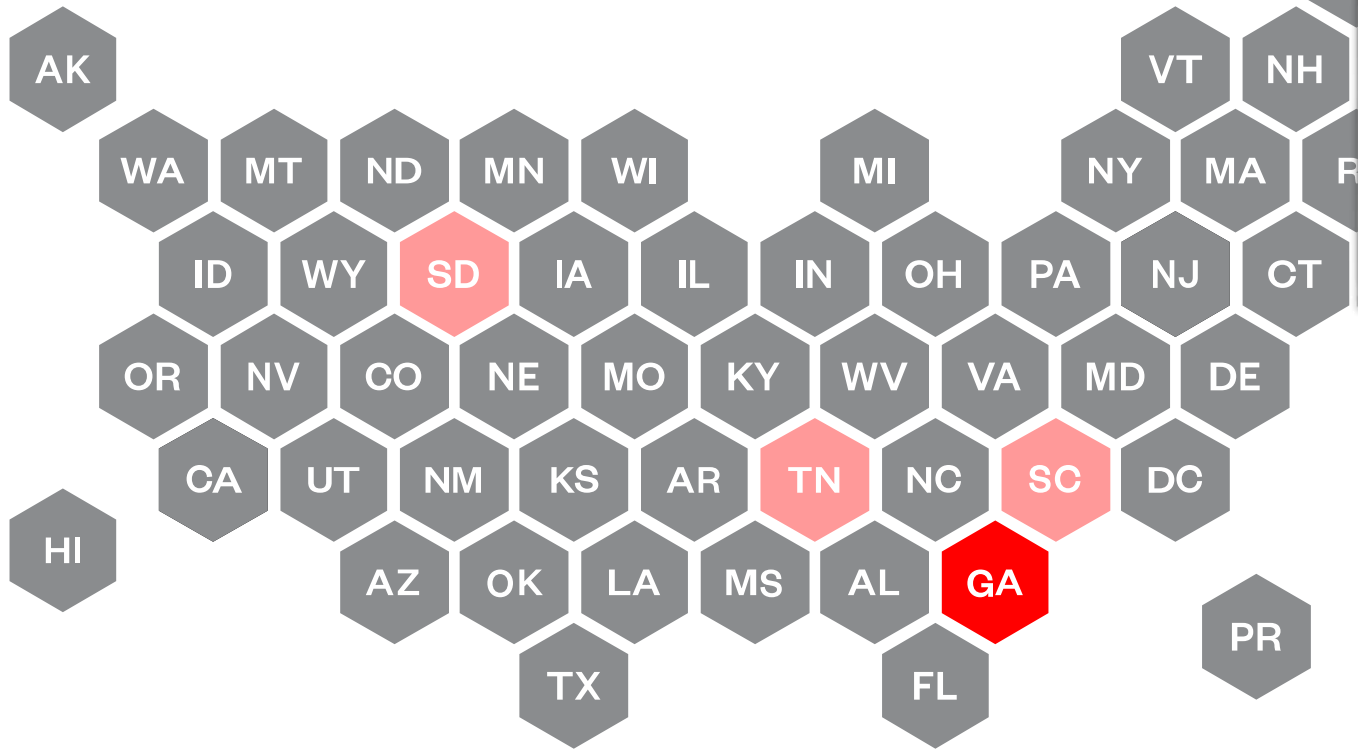
 **Gov. Henry McMaster** ✓
@henrymcmaster

 **Governor Kristi Noem** ✓
@govkristinoem

South Dakota will stand up to defend freedom.

[@JoeBiden](#) see you in court.

4:14 PM · Sep 9, 2021 · Twitter for iPhone



Gov. Bill Lee  @GovBillLee

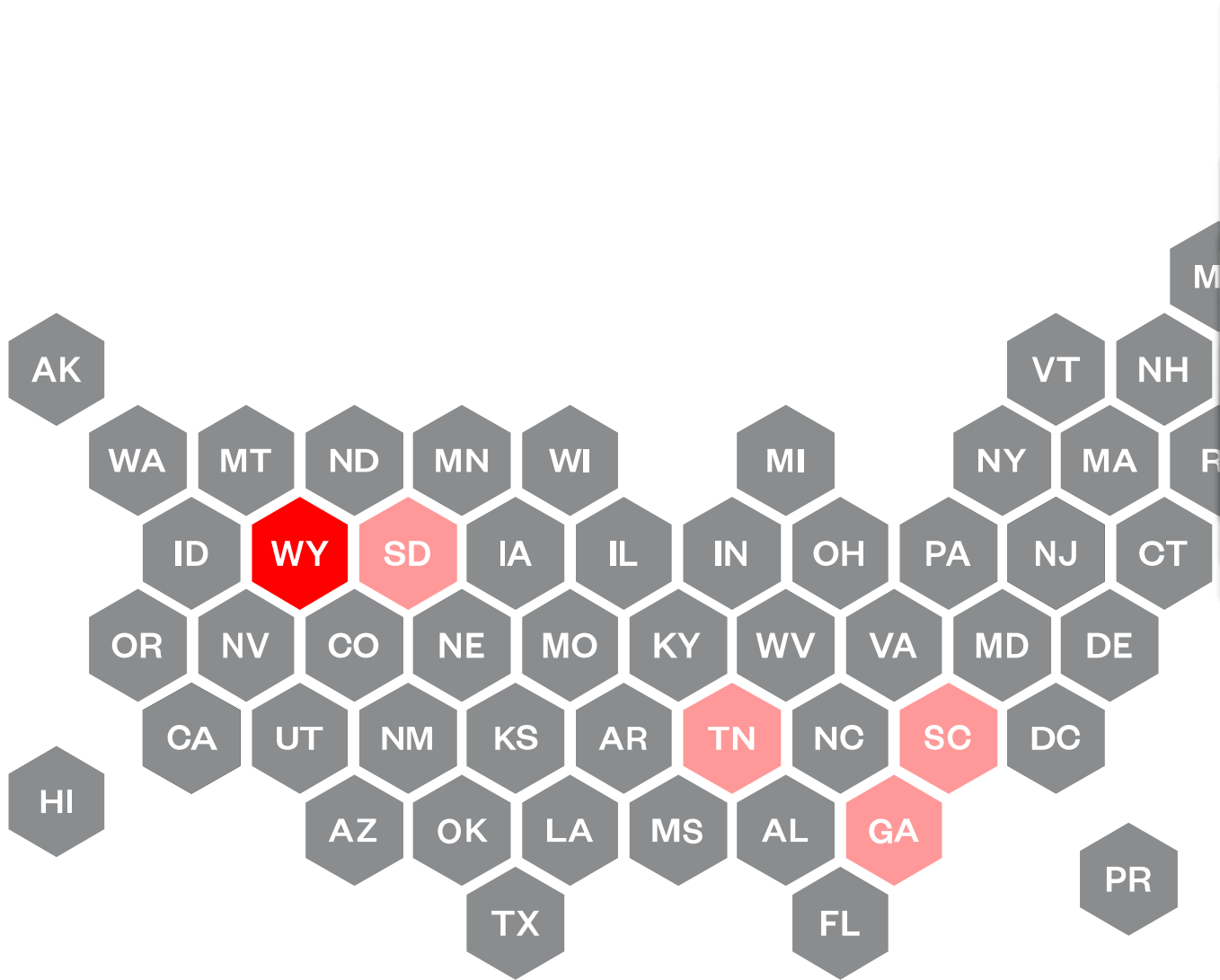
Gov. Henry McMaster  @henrymcmaster

Governor Kristi Noem  @GovNoem

Governor Brian P. Kemp  @GovKemp

I will pursue every legal option available to the state of Georgia to stop this blatantly unlawful overreach by the Biden administration.

5:25 PM · Sep 9, 2021 · Twitter for iPhone



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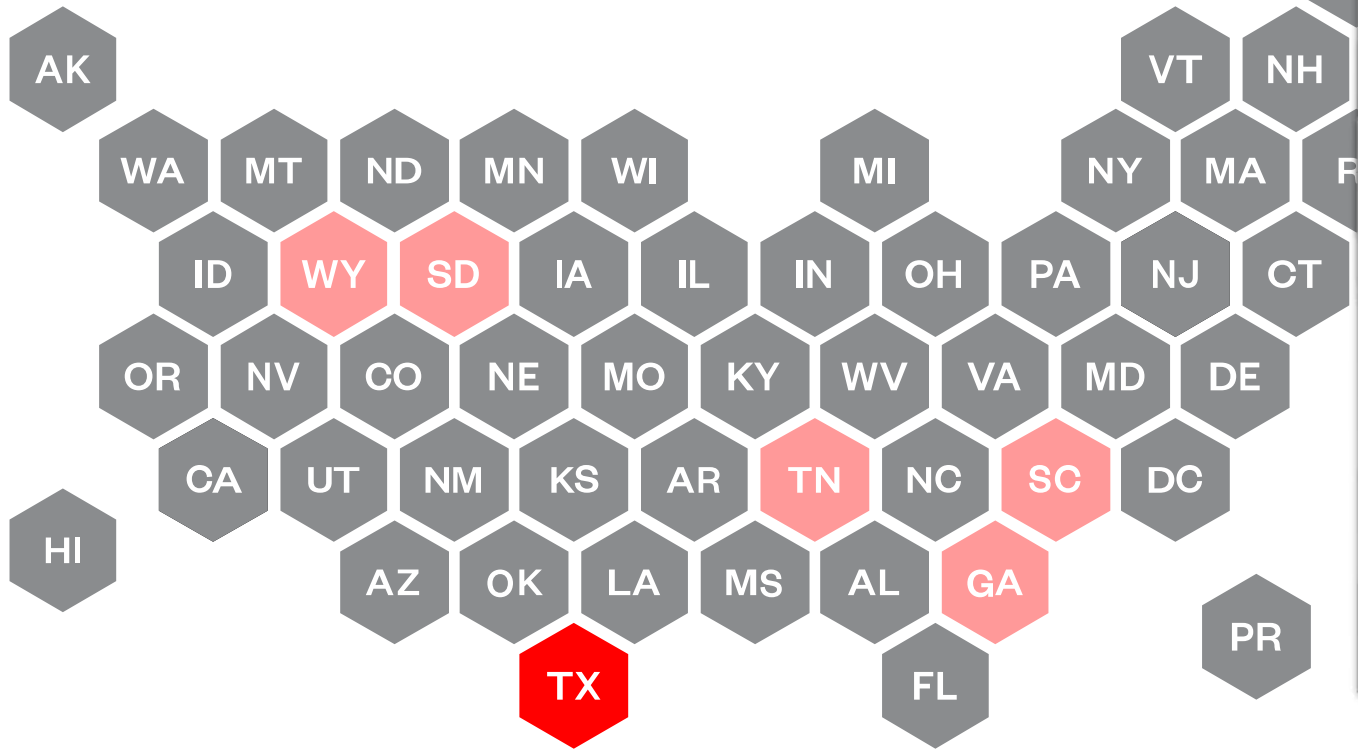
Governor Kristi Noem  @KristiNoem

Governor Brian P. Kemp  @GovKemp

Governor Mark Gordon  @GovernorGordon · Sep 9

I have asked the Attorney General to stand prepared to take all actions to oppose this administration's unconstitutional overreach of executive power. It has no place in America. Not now, and not ever.

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Governor Kristi Noem  @KristiNoem

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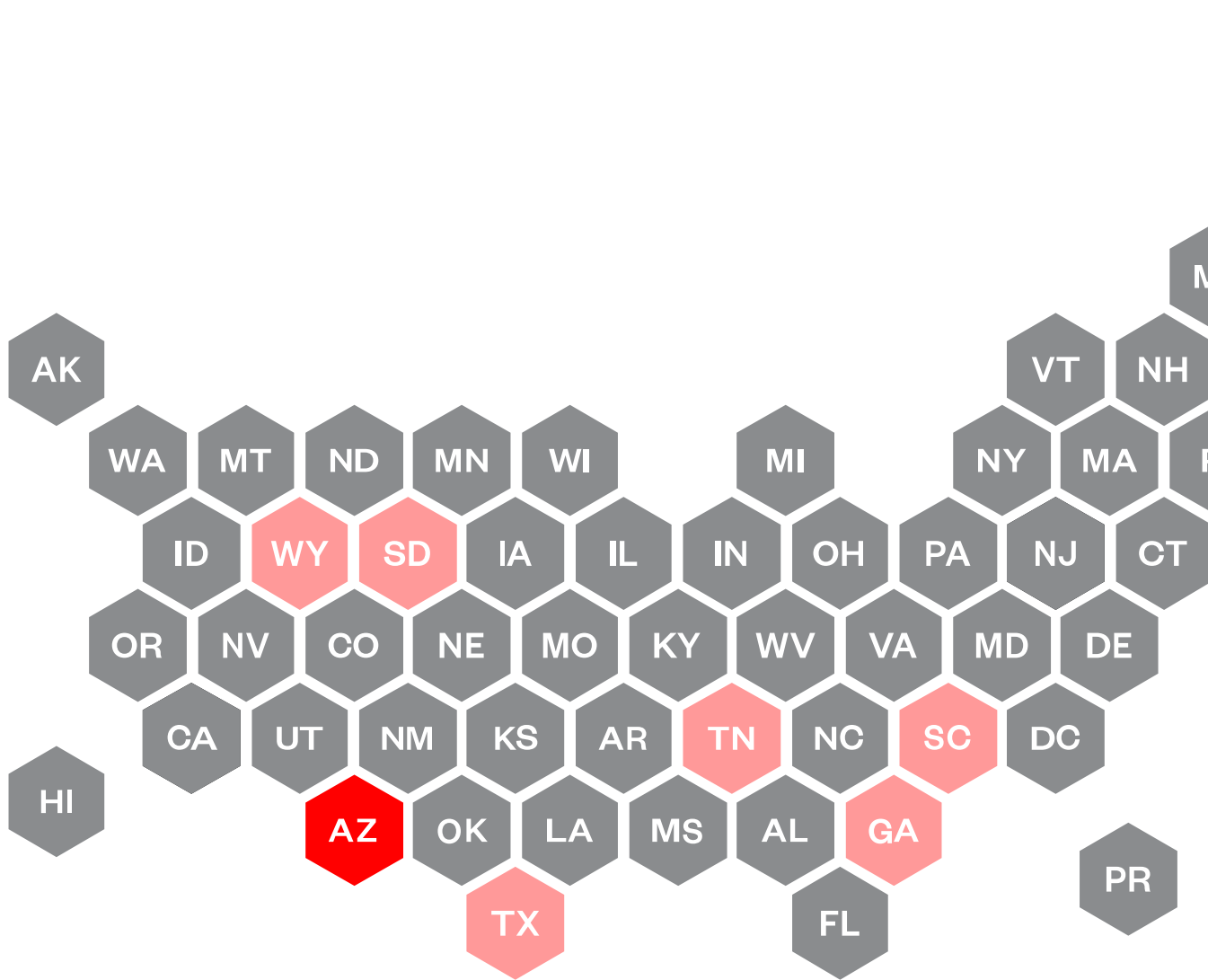
Governor Mark Gordon  @GovernorGordon - Sep 9

Greg Abbott  @GregAbbott_TX

Biden's vaccine mandate is an assault on private businesses.

I issued an Executive Order protecting Texans' right to choose whether they get the COVID vaccine & added it to the special session agenda.

Texas is already working to halt this power grab.



Gov. Bill Lee  @GovBillLee

Gov. Henry McMaster  @henrymcmaster

Governor Kristi Noem  @KristiNoem

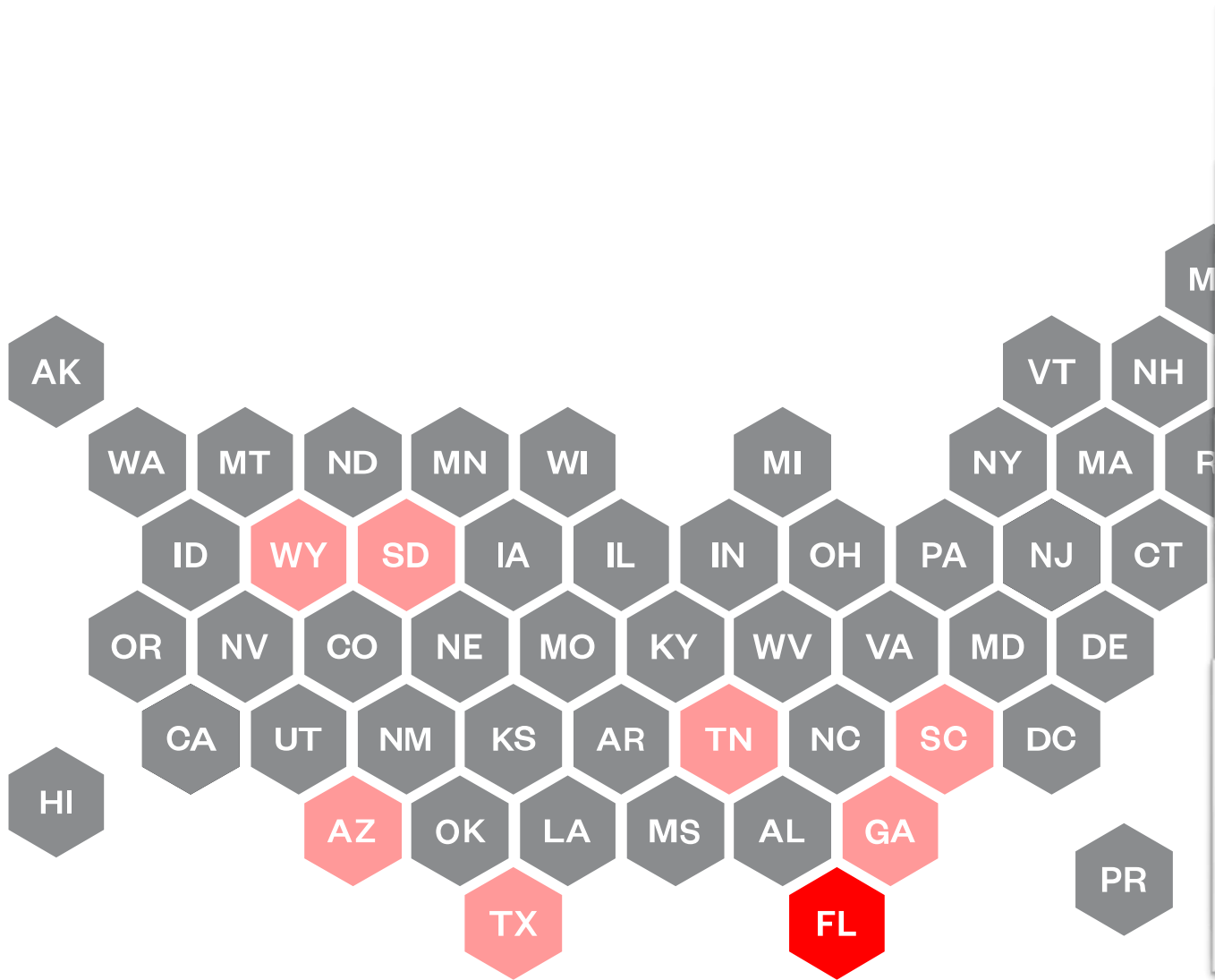
Governor Brian P. Kemp  @GovKemp


Governor Mark Gordon  @GovernorGordon - Sep 9


Greg Abbott  @GregAbbott_TX


Doug Ducey  @dougducey


This is exactly the kind of big government overreach we have tried so hard to prevent in Arizona — now the Biden-Harris administration is hammering down on private businesses and individual freedoms in an unprecedented and dangerous way. This will never stand up in court. 1/2





Gov. Bill Lee  @GovBillLee


Gov. Henry McMaster  @henrymcmaster



Governor Kristi Noem  @KristiNoem

Governor Brian P. Kemp  @GovKemp

Governor Mark Gordon  @GovernorGordon - Sep 9

Greg Abbott  @GregAbbott_TX

Doug Ducey  @dougducey

Ron DeSantis  @GovRonDeSantis 

Governor DeSantis holds a press conference to address the recent attacks on Floridians' freedoms.

Watch Live:

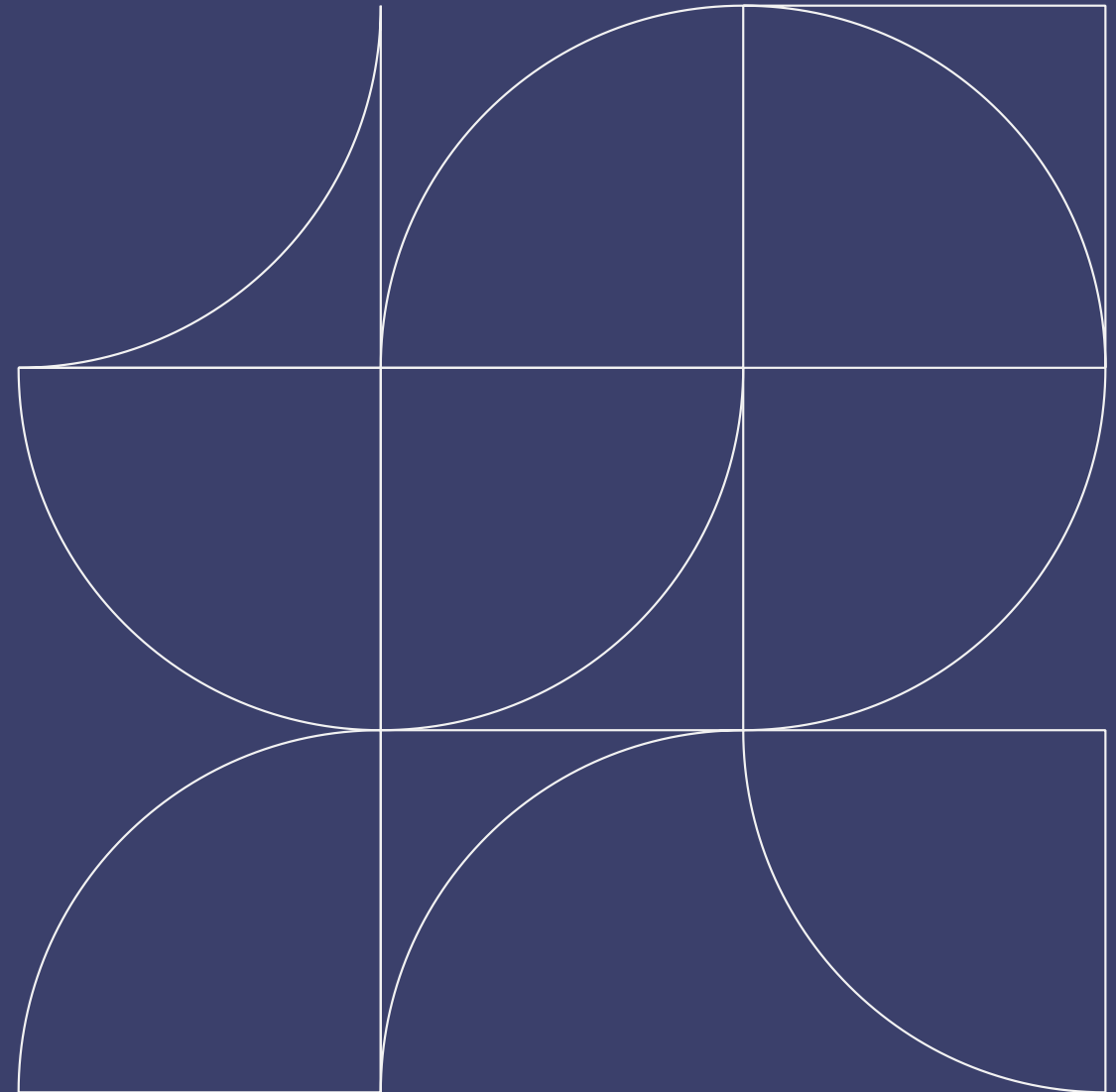
How Will it Be Challenged

- Any person “adversely affected” may petition federal appellate court where they live or maintain principal place of business
 - Petition doesn’t automatically stay ETS, but court may order a stay
 - In the nine times OSHA issued an ETS between 1971-83, six resulted in a challenge—and all but one succeeded, at least in part
 - Potential for consolidation
- State AGs are lining up to challenge
 - May pursue appellate filing route, though standing may be questioned
 - Arizona AG has filed suit in federal district court based on U.S. Constitution

Grounds for Challenge

- Direct appeal challenge will focus on “grave danger” and “necessity”
 - With health care ETS, Biden administration resisted urges by labor groups to cover broader swath of industry
 - OSHA will argue that delta variant presents a grave danger
 - Opponents will argue that it does not, and/or that the ETS is not necessary to provide protection from that danger
- State AGs may follow Arizona with constitutional challenge
 - Arizona argues under Equal Protection Clause that mandates “respect[] the putative rights of those illegally entering the United States, while simultaneously showing contempt for the actual rights of U.S. citizens”
- Other avenues?
 - Possible nondelegation challenge, similar to CDC moratorium

Policy Considerations



Strategic Communications

- **Announce / Revise the Policy**
 - CEO Driven: Culture, Safety
 - Government Mandate
- **Explain Requirements**
- **Describe Accommodation Process**
- **Establish Timeline**
- **Consequences of Noncompliance**
 - Condition of continued employment
 - Testing
 - Remote Only
- **Prepare for Challenges**
 - If announced as an EO requirement, what happens if a challenge succeeds

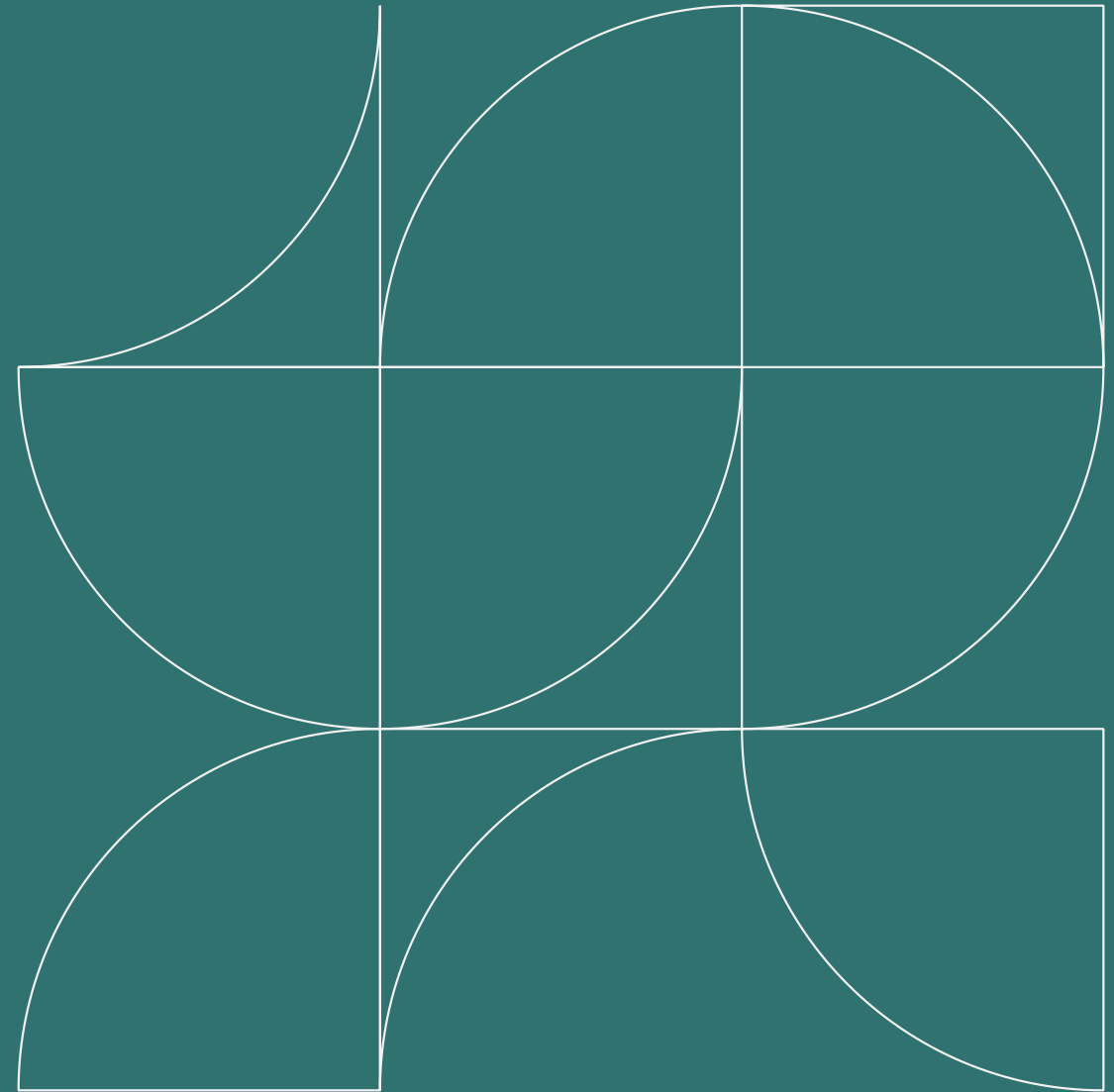
Practical Considerations

- Coverage
 - “on or in connection with such contracts”
 - 100+ employees
 - All workers
 - Returning on-site
 - Working with others
- Reasonable, non-discriminatory basis
- Consequences
 - Remote work as accommodation
 - Others (PPE/masking, distancing, transfer, leave)
 - Testing
 - Progressive discipline / termination

Testing

- Alternative or Accommodation
- Cost and Burden
- Designated or Undesignated Times
- On-site or Off
- Supply Chain Issues

Accommodations Strategies



Accommodations Issues

- **Types of Accommodation Requests**
 - Religious
 - Medical/Disability
 - “Other”
- **Decide Organizational Approach**
 - Lax or strict? Or somewhere in between?
- **Set Up Your System**
 - How will you intake accommodation requests?
 - How will you evaluate whether to accept/reject requests?
 - How will you communicate decisions?
- **Preparing for Consequences**
 - Implementing accommodations
 - Options where no reasonable accommodation?

Accommodations Issues – Main Types of Exemptions

Medical/Disability

- ADA, Rehabilitation Act, Title VII, and many state laws govern protections and accommodations based on disability and/or medical conditions
- Employers required to give **reasonable accommodations** absent **undue hardship**
- Generally cannot exclude individuals from the workplace for health or safety reasons unless “**direct threat**” even with reasonable accommodation

vs.

Religious

- Title VII protects employees who have a sincerely held religious belief, practice, or observance that prevent them from taking a vaccine
- Covers more than traditional religions
- Employers required to give **reasonable accommodations** absent **undue hardship** (more than de minimis cost)

The “Other” Exemptions – Personal, political, secular, etc. not required to be accommodated; not allowed under some mandates

Accommodations Issues

Decide Organizational Approach

Main Paths and Considerations

- Accept Exemption Requests at Face Value
 - Path of least resistance; easier for HR/Legal
 - Potential downsides
- Requiring Backup Support for Exemption Requests
 - Middle ground
 - What you can/cannot require
- Scrutinize Exemption Requests
 - Stronger position
 - Involve HR and/or Legal teams
 - May combine this with the “defer judgment” on exemption

Accommodations Issues – Set Up Your System

1

2

3

1. Intake

- Establish forms or method for employees to submit exemption requests
- Consider volume in determining approach
- Designate reviewing personnel or team (HR and/or Legal)

2. Evaluate

- Individualized assessment/interactive process required
- If large volume, may need “bucketing” or process flows
- Is there objective evidence of sincerity/insincerity?
- Determine if sufficient information provided or follow up needed
- Consider second level review of rejections

3. Communicate

- Clearly communicate and document decision and reasoning: accept, reject, or defer

Preparing for Consequences

- **Implementing Accommodations**
 - Masking
 - Frequent testing
 - Closed offices, partitions, distancing
 - Remote work
 - Modified shifts or reassignment
- **Options Where No Reasonable Accommodations?**
 - Temporary job alteration
 - Leave of absence
 - Termination

**Thank You for
Attending**

