



COVID-19 Vaccine: What Employers Should Expect

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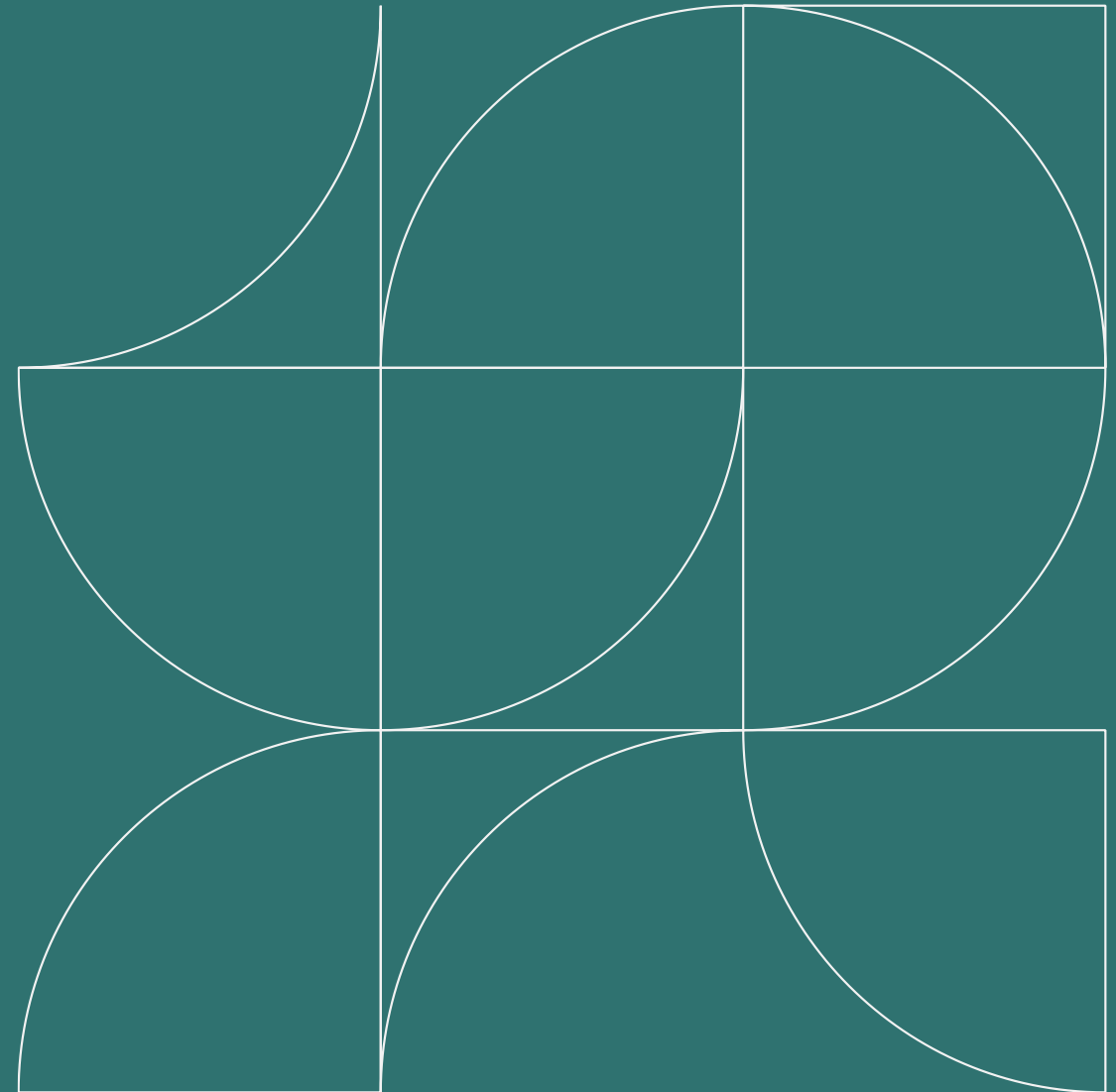
In regards to your company's COVID-19 vaccination plans, please indicate whether your company will likely:

- A. Require employees to get the COVID-19 vaccine
- B. Encourage employees to get the COVID-19 vaccine
- C. Not sure at this time

Part I

US Vaccine Discussion

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Agenda

- 1 | EEOC Guidance
- 2 | Mandatory vs. Voluntary Vaccine Programs in the Workplace
- 3 | OSHA & CDC Guidance
- 4 | Accommodation Requests

**EEOC Says
Employers Can
Mandate Vaccination
Company-Wide if
they:**

- Have employees receive vaccine from an independent third party
- Comply with ADA and Title VII (religious) accommodation requirements

Third Party Provider Issues

- No contractual relationship means none whatsoever
 - Referrals may be okay under limited circumstances
- This avoids employer asking otherwise prohibited pre-vaccination questions.
- If employer itself administers vaccines (or uses a related provider), it must establish case-by-case that the unvaccinated employee poses a *direct threat* to others.
 - Virtually impossible as to all employees, among other reasons because of accommodation requirements.
- Vaccination via employer-sponsored voluntary wellness programs is an alternative.
 - But then vaccination isn't really mandatory.

Reasonable Accommodation Issues: ADA

- Details to follow with Megan Toth
- Employee must have an ADA-covered disability
- Fear is not a disability, but anxiety disorder may well be

Reasonable Accommodation Issues: Religion (Title VII)

- Employee must request accommodation or otherwise provide notice to employer.
- Employee must have “sincerely held” religious beliefs that preclude vaccination.
- EEOC says employers generally should not question employees’ religious beliefs.
 - Courts generally agree, both within and outside vaccination contexts.
 - But being an “anti-vaxxer” is not a religious belief.
 - Working remotely is an obvious (though not necessarily feasible) accommodation.
 - But employers should assess feasibility today, not as things were pre-pandemic.

Reasonable Accommodation Issues: Religion (Title VII) - cont'd

- Employer still has an undue hardship defense.
 - Much easier to prove under Title VII than under ADA.
 - However, employer must prove hardship can't be averted through reasonable accommodation (e.g., social distancing, masks, and frequent hand-washing)
- Accommodations that “burden others” generally are not required, but what does “burden others” mean?
- If accommodation isn't possible, termination doesn't necessarily follow.

Mandatory versus Voluntary – Pros and Cons of Mandatory Vaccines in the Workplace

PROS

- More people will be vaccinated – at least in theory
- Increased morale for pro-vaccine employees
- Tell clients and customers you require the vaccine
- Demonstrates reasonable care

Mandatory versus Voluntary – Pros and Cons of Mandatory Vaccines in the Workplace

CONS

- Unlikely you will have 100% vaccinated workforce
- Decreased morale for anti-vaccine employees
- Increased risk of litigation
- Standing up and administering accommodation process
- Potential workers compensation liability for adverse effects
- Need to pay for time spent being vaccinated and any attendant costs
- Clear authority for mandate comes from EEOC in light of federal employment law – not states in light of state law.
- Need to discipline/terminate otherwise good employees who do not want to be vaccinated.

Key questions



ASK YOURSELF

- Do you really think significantly more employees will be vaccinated if you mandate the vaccine?
- Is it worth waiting for one or more of the vaccines to be fully approved by the FDA (as opposed to authorized under EUA status) before deciding about a mandate?

CDC Guidance: Vaccines

- Strongly recommends people get the vaccine
- Has created priority eligibility groups related to the vaccine rollout
 - But remember state and local ordinances
- Has a fact sheet to help educate individuals about the vaccine

CDC Guidance: Fully Vaccinated Individuals

Non-Healthcare Settings

- **Can:**

- Visit other fully vaccinated people indoors without social distancing or wearing masks
- Visit unvaccinated people from a single household who are low risk for severe COVID without wearing a mask or socially distancing
- Refrain from quarantining and testing if exposed but asymptomatic
- Remember states and municipalities may have different rules

- **Should**

- Wear masks and socially distance in public
- Avoid medium and large size in-person gatherings
- Wear masks and socially distance when with multiple households

OSHA Guidance: Vaccines

- **Make vaccine available at no cost to employees**
 - Provide information and training on safety of vaccines
 - Do not distinguish between vaccinated and unvaccinated employees – all still need to follow protective measures



Reasonable Accommodations Under the ADA

- Mandatory Vaccine Program
- If employee cannot get vaccine **because of qualifying disability** may be entitled to reasonable accommodation under the ADA
- EEOC Guidance, *December 2020*
 - **Direct Threat Assessment** – must determine that unvaccinated person exposes others to the virus at the worksite
 - Nature of work
 - Amount of contact with others
 - How many others in workplace are vaccinated
 - Cannot automatically exclude from worksite or take any action even if direct threat, unless no reasonable accommodation is available that would eliminate or reduce the risk of unvaccinated employee no longer poses a direct threat.

Reasonable Accommodations Under the ADA

- **Examples of Disabilities**
 - Anxiety
 - Allergy*
 - Certain Autoimmune Disorders
 - Other
- **Must Follow Standard ADA Process**
 - Interactive process / Individualized Assessment
 - Supporting medical documentation
 - Cannot automatically terminate
 - Train managers responsible for communicating/facilitating vaccine program

Reasonable Accommodations Under the ADA

- **Possible Reasonable Accommodations**
 - Masks / Face Coverings or Other PPE
 - Testing
 - Social Distancing
 - Remote Work
 - Alternative Work Hours (less exposure)
 - Leave of Absence*
 - Combination of the Above

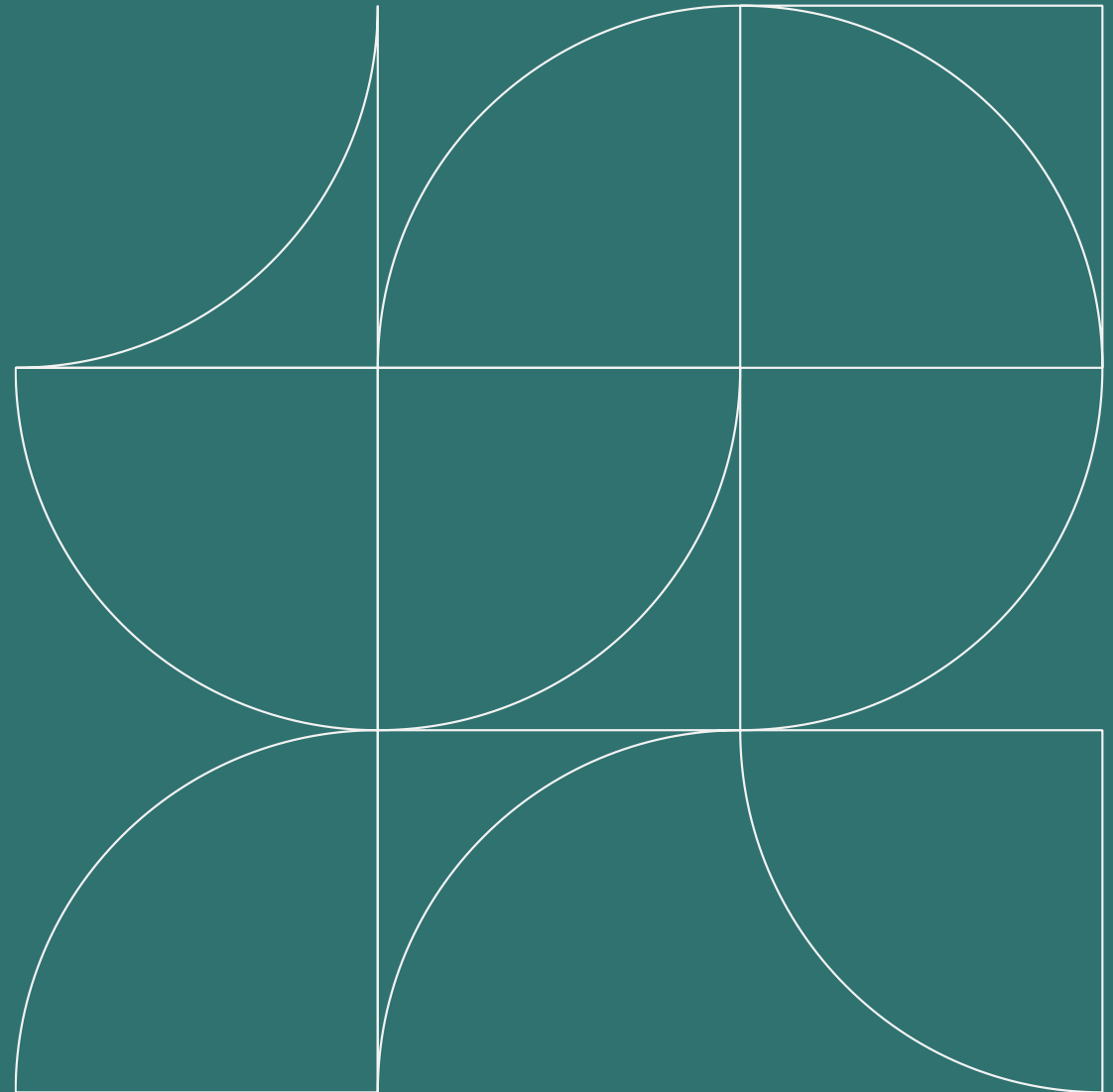
Other Leave/ Accommodation Issues

- Leave of absence can be a reasonable accommodation
 - Indefinite Leave is **not** reasonable accommodation
- Pregnancy/Breastfeeding Accommodations
- State / Local **Paid Leave** Laws
 - Paid time off mandates for side effects
 - Paid time off mandates for time to get vaccine
 - New York Law
 - Hazard / Hero Pay

Part II

Global Vaccine Discussion

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Agenda

- 1 | Vaccine landscape OUS - several obstacles to mandatory vaccination
- 2 | Can employers mandate vaccination?
- 3 | What about encouraging vaccination?
- 4 | Mobile employees/international travel
- 5 | Privacy considerations
- 6 | International health and safety considerations

Vaccine Landscape Outside the United States

Several obstacles to mandatory vaccination

Access and supply is state controlled and slow in most locations



Business likely to “re-open” prior to wide availability

Cultural norms and employee expectations:

- Role of employee representative bodies
 - Privacy rights and expectations
- Knowledge of vaccine status – can employers even ask?
- Human rights/fundamental freedoms
 - Vaccination acceptance/ refusal of specific vaccines

Can employers mandate vaccination?


Generally, no given not mandated by OUS governments (this may change)


For now, supply and roll out is government administered and on a priority basis.


Discrimination risks – race, belief, age as well as disability

Scope for refusal broader than US standard –employees generally not “at will”


New hires vs current staff

 Lower risk for new hires (employees and contractors)


 Lower bar to justify given not on current contracts

 But discrimination protection generally still applies



 For existing employees:

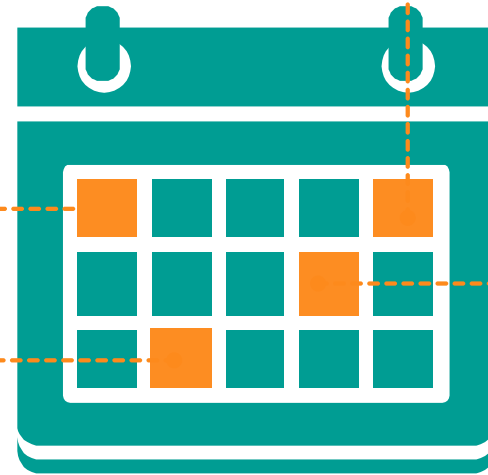
- Is vaccination essential to do the job?
- If employees don't agree: grounds for discipline? Termination?
- Prior process: Works Councils? Warning process?
- Are there alternatives? Changing duties?

 Some governments considering vaccine passports and incentives – may change the landscape

What about encouraging vaccination?

Generally, OUS employers may choose to encourage vaccination

• Safety and employer liability



• Paid time off

Considerations for incentives – can incentives be too good?

- for vaccination
- for recovery from side effects

Mobile employees/international travel

Can mandatory vaccination be justified for business travel?

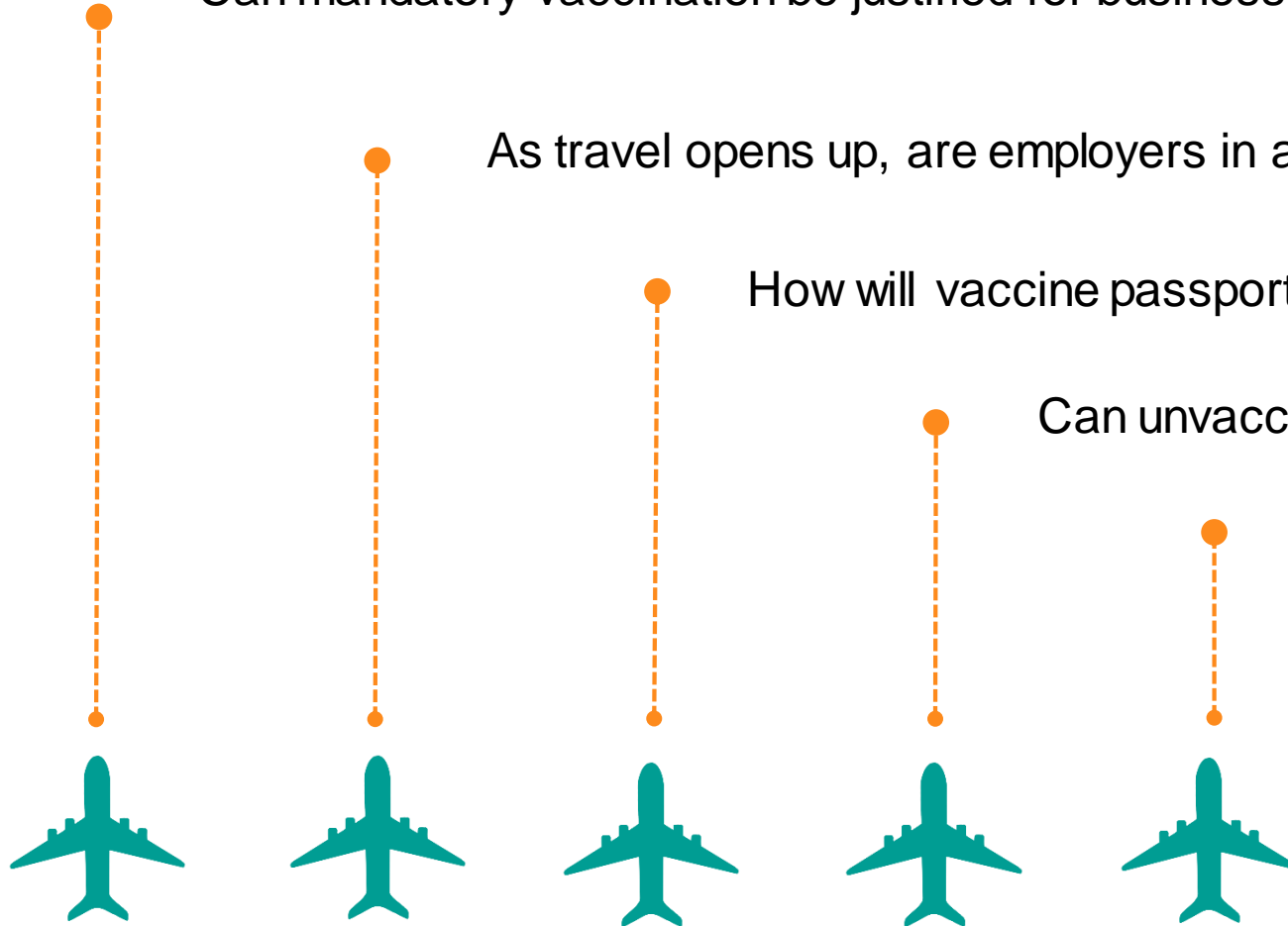
As travel opens up, are employers in a stronger position to insist?

How will vaccine passports affect ability to do a job?

Can unvaccinated stay home?

Challenges remain:

- differing country requirements
- future specific lockdowns



Privacy Considerations



● Privacy rights impact mandatory vaccination, encouragement and requests for proof

● “Sensitive” or “special category” medical data in most jurisdictions

Europe - consent in this context is problematic

Need a valid reason e.g. public interest

Consent may be acceptable in APAC/LATAM and other locations

Transfers of data out of the jurisdiction

● Minimizing the data collected

Data Retention Issues

Additional complexities



Keeping
vaccination data
accurate



Limiting use of
vaccination
data/purpose
limitation

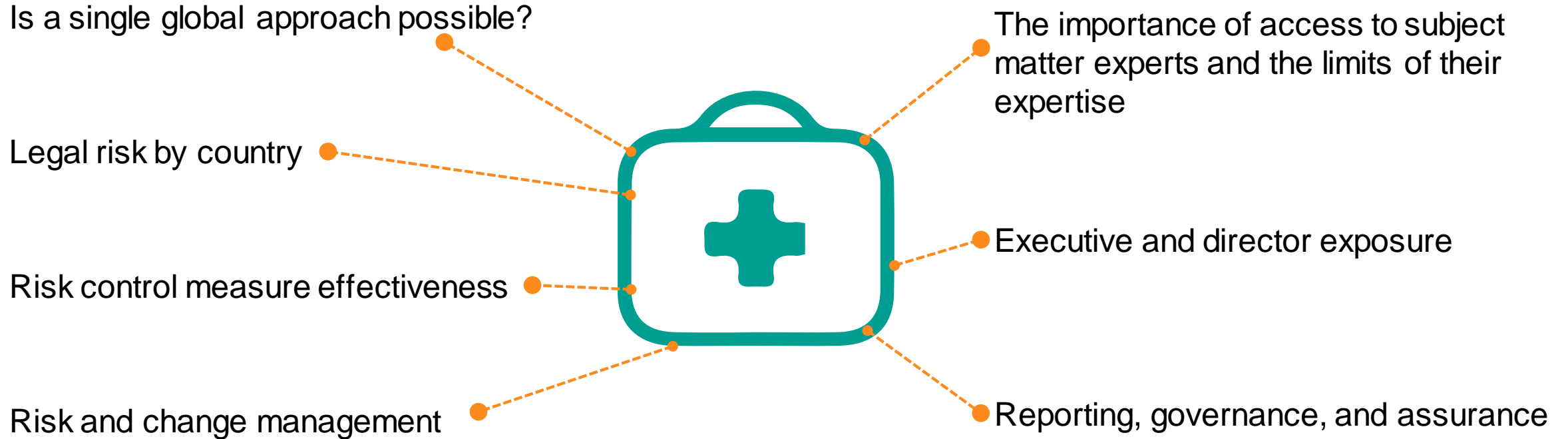


Securely deleting
data that is
obsolete



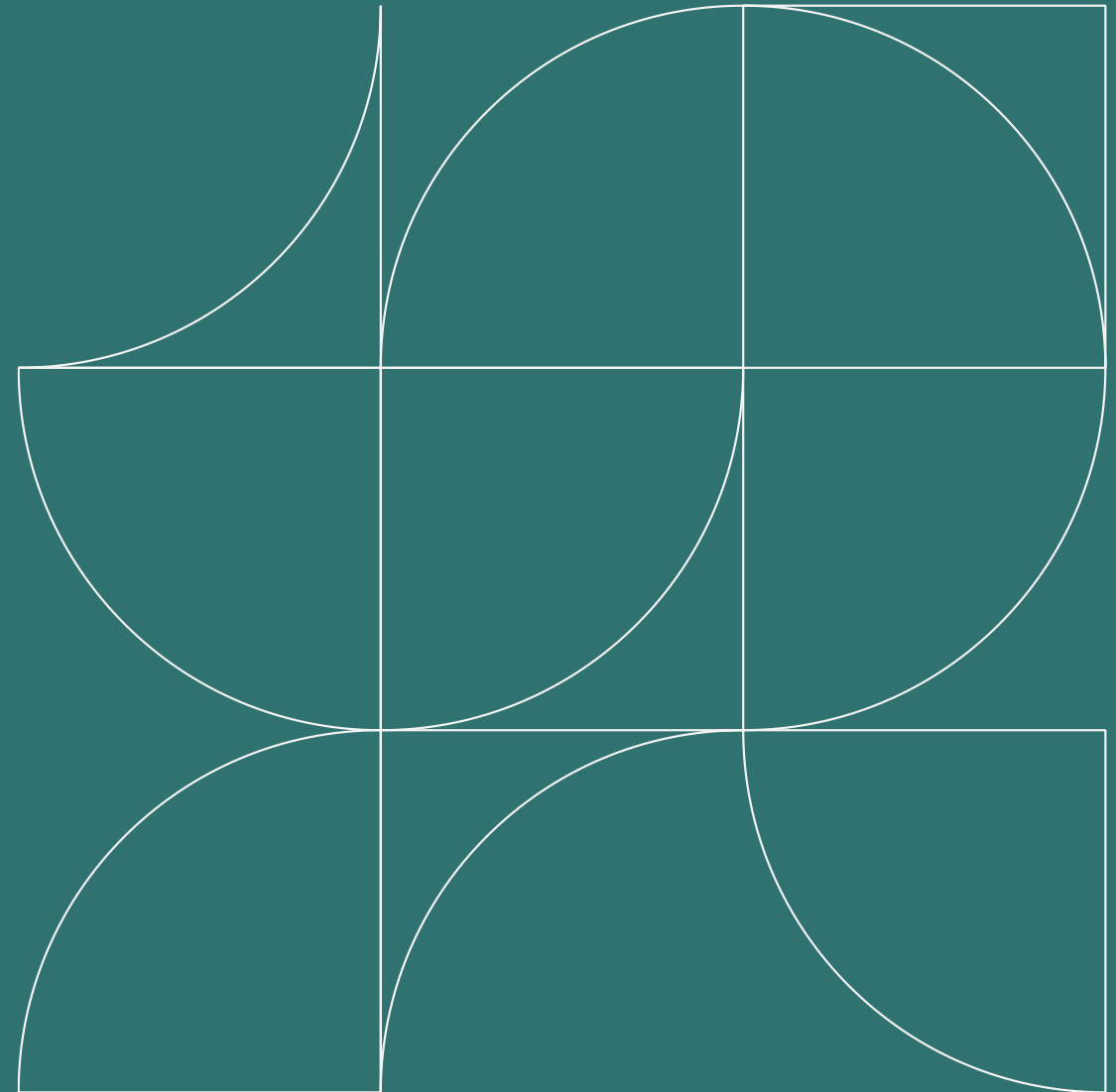
Data
stewardship
and security

International health and safety considerations



Part III

US / Global Panel Discussion



**thank
you**