



# Navigating the Return to Work:

Vaccines, COVID-19 as a Disability, OSHA Enforcement, and More

April 20, 2022

**Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).  
©2022 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



# Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

## **Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2022 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

# Speakers

---



**Karla Grossenbacher**  
Partner  
Washington D.C.



**Condon McGlothlen**  
Partner  
Chicago



**Kristin McGurn**  
Partner  
Boston



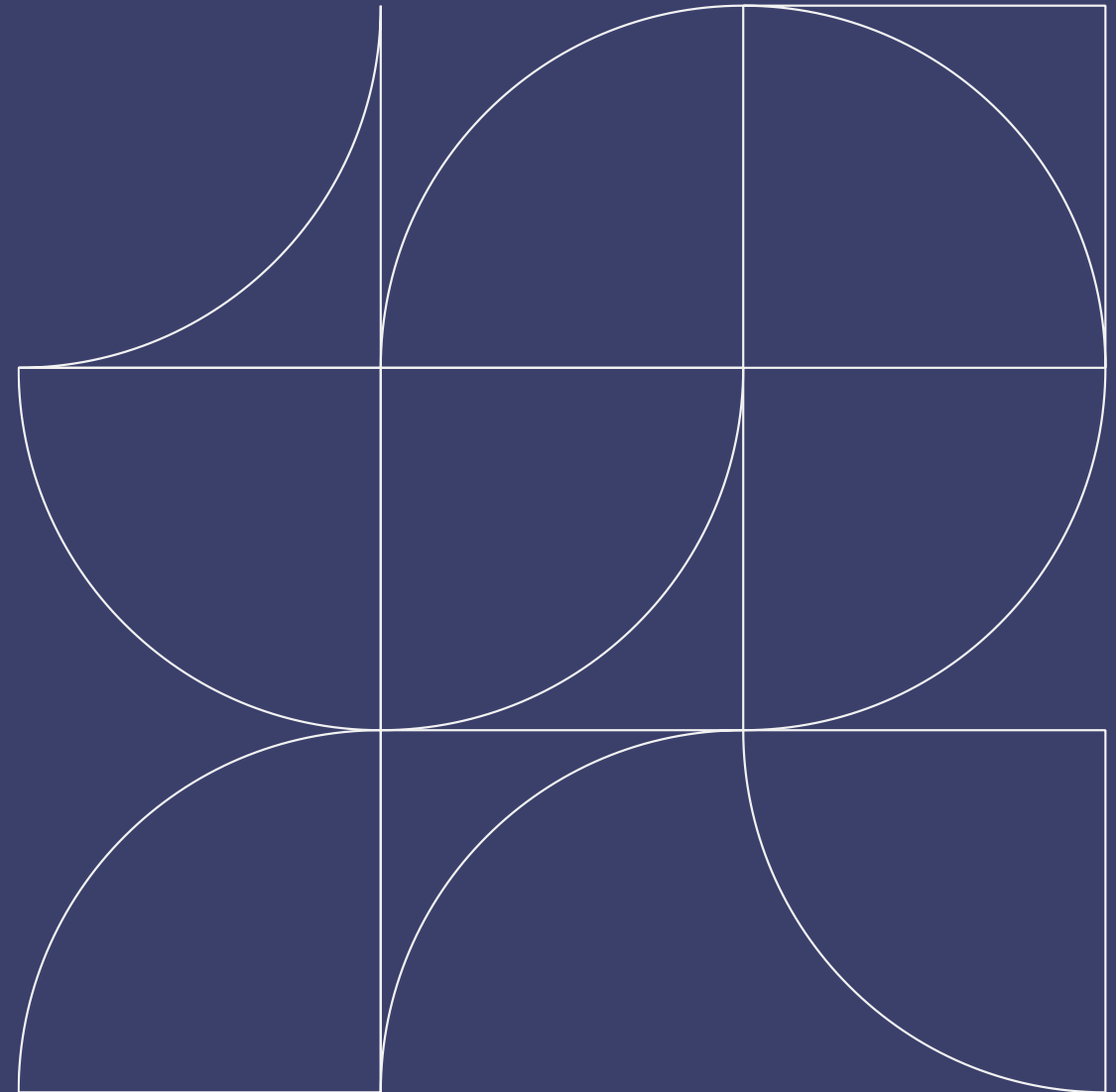
**Scott Hecker**  
Senior Counsel  
Washington D.C.

# Agenda

---

- 01** Vaccinations – Exemptions Under State Law
- 02** Status of OSHA's ETS and What's Next from OSHA?
- 03** Federal Contractor Mandate – Status of Litigation and What Should Contractors Do?
- 04** CMS Rule – Who and How
- 05** Long COVID as a Disability

# Vaccinations – Exemptions Under State Law





# Employer Mandatory Vaccination

- Any employer can mandate COVID vaccine for employees, including a booster, under federal employment law if (1) the employer provides accommodations absent undue hardship for sincerely held religious beliefs and disabilities; and (2) the employer or its agent is not the one administering the COVID vaccine.
- Employers can request/require employees to provide proof of vaccination/vaccination status information from employees under federal employment law
- But beware of state law prohibitions



# State Laws Undermining Employer Vaccine Mandates

**13** states with laws or orders undercutting employer vaccine mandates (Alabama, Arkansas, Florida, Indiana, Iowa, Kansas, Montana, Nebraska, North Dakota, Tennessee, Texas, Utah and West Virginia)

- No undue hardship, no follow up questions
- Additional laws have been proposed across the 50 states and more coming

# Types of Exemptions Under State Law - Medical Exemptions



- HCP recommends refusal of vaccine/vaccine would endanger life or health of person
- Production of negative antigen test once a week
- Vaccination would be injurious to the health and well-being of the employee or an individual residing with the employee
- Medical contraindication for vaccine
- Medical necessity requires delay in vaccine



# Types of Exemptions Under State Law - Medical Exemptions



- Proof that:
  - Employee has prior allergic reaction to vaccine
  - Employee has immunity to COVID (as shown by presence of antibodies, T-cell response, receipt of monoclonal antibodies or convalescent plasma. polymerase chain reaction test)
  - Employee is pregnant or anticipates being pregnant
  - Employee has bleeding disorder or is taking blood thinner
  - Employee is severely immune-compromised
  - Employee has been previously diagnosed with COVID

# Types of Exemptions Under State Law - Religious and Other Exemptions



- COVID vaccination conflicts with or violates sincerely held religious belief, practice or observance
  - Employee declines because of sincerely held religious belief
  - Vaccination would conflict with the tenets of a religion of which the employee is an adherent or member
- The individual's philosophical or moral beliefs are opposed to vaccination
- Vaccination would conflict with a sincerely held personal belief of the employee

Any reason of personal conscience

# Interactive Discussions and Undue Hardship

- Generally, either expressly prohibited or not provided for under state law
  - Exceptions: Indiana (comply with Title VII),  
Arkansas/North Dakota (no express statement)

## What About Applicants?



- Seven of the state laws apply to applicants or apply to “individuals” but AI, AK, FL, IN, IA, and KS refer only to employees

## What About Enforcement?



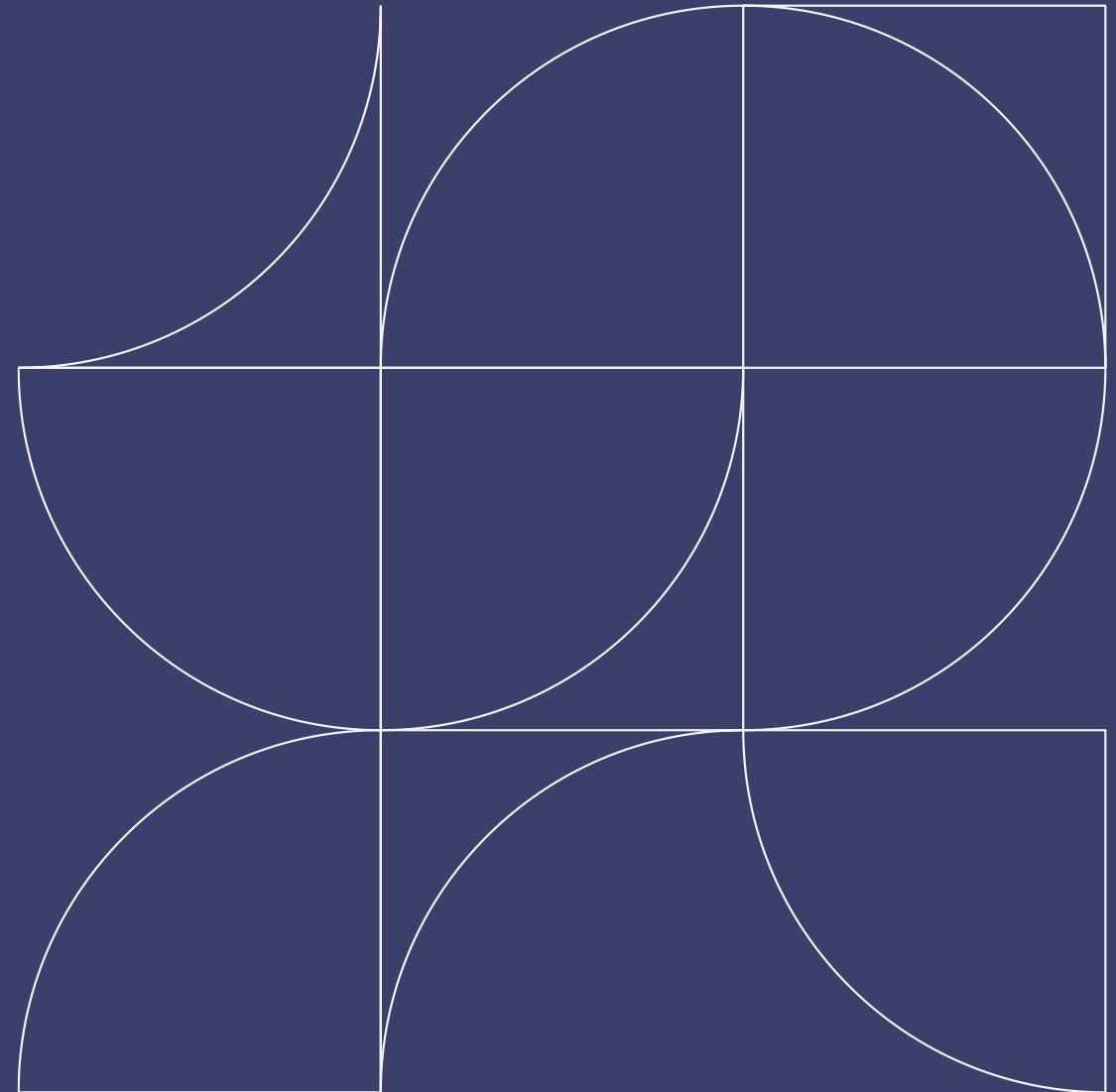
- PRA for employee in FL and MT
- In WV, injunctive relief only
- Enforced by AG in TN
- In KS, judicial review of state DOL order, which is enforceable by AG
- In AL, both appeal and judicial review if employer denial upheld.



## Best Practices

- Make sure your process is compliant
- Determine where employees reside/work
- Train accommodation team

# Long COVID as a Disability



# What Is This Condition and What Is It Called

---

- Symptoms (new, ongoing, or current)
- Multiorgan Effects of COVID-19
- Effects of C-19 Illness or Hospitalization

CDC, *Post-COVID Conditions*, last updated Sept. 16, 2021

EEOC Technical Assistance, *what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws*, last updated March 14, 2022. See also



# Is Long COVID a Disability under the ADA?

---

- EEOC says it can be under any or all of the three prongs:
  1. “Actual” disability (duty to accommodate)
  2. “Record of” a Disability (duty to accommodate)
  3. “Regarded as” an Individual with a Disability (no duty to accommodate)
- Determinations must be made case-by-case depending on duration, severity, etc. Remember that even temporary conditions can be a covered disability.
- DOJ and HHS have also said long COVID can be a disability under ADA Titles II and III and Section 504 of the Rehabilitation Act.

# Accommodating Long COVID

---

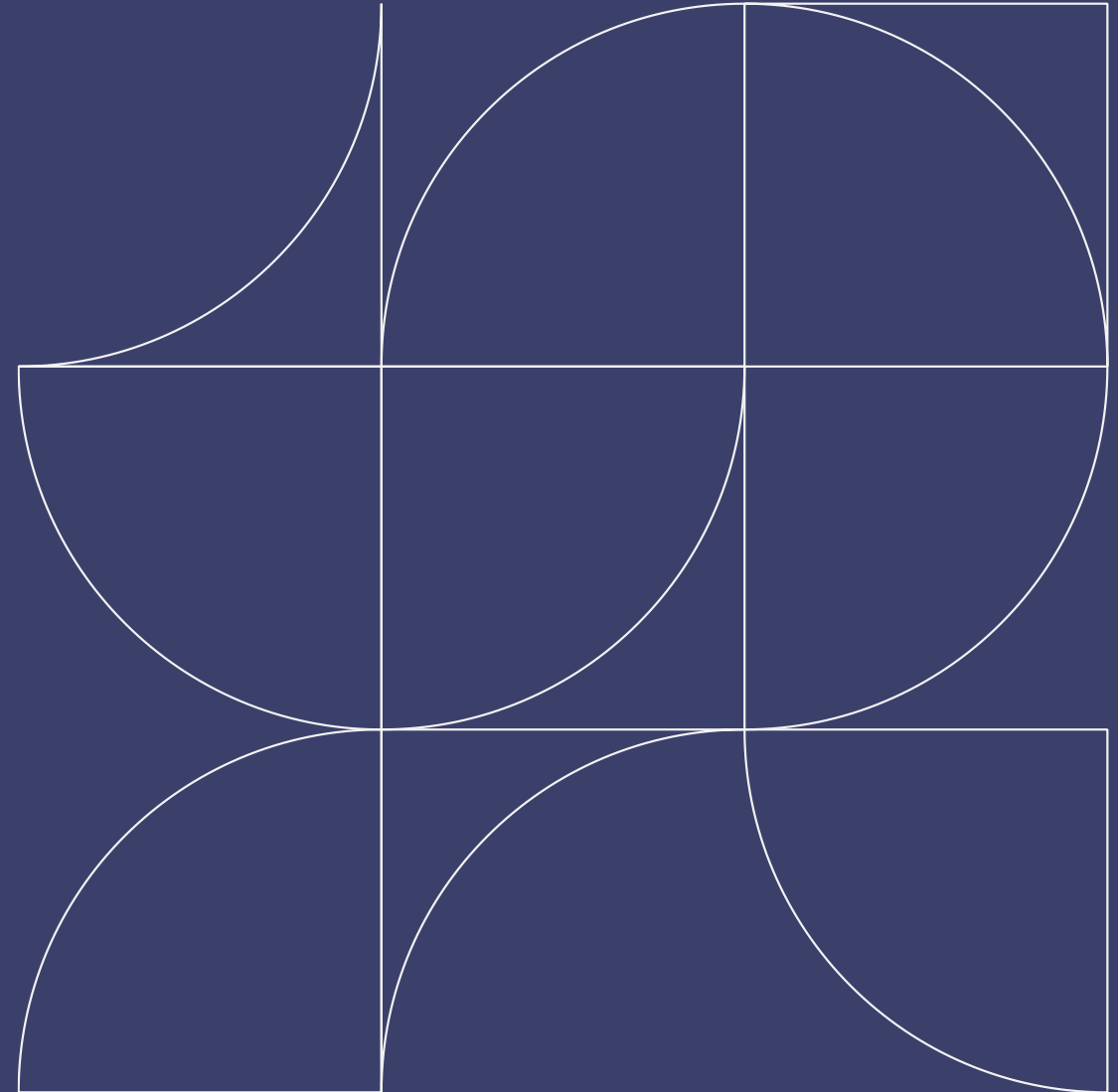
- The usual ADA accommodation principles apply: the employee must generally request accommodation, the employer can require supporting medical documentation
- EEOC's suggested accommodations include schedule changes, physical modifications to the workplace, working remotely, or special/modified equipment. See EEOC Technical Assistance, *what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws*, last updated March 14, 2022.
- CDC says possible accommodations could include “flexible leave and work schedule policies, and by providing access to employee assistance programs.” CDC, Post-COVID Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html>, updated Sept. 16, 2021 (contains a step-by-step process for discussing long COVID with affected individuals to identify their concerns and needs)

# Other Resources for Accommodation and Generally

---

- CDC, Post-COVID Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html>, updated Sept. 16, 2021 (contains a step-by-step process for discussing long COVID with affected individuals to identify their concerns and needs)
- Caring for People with Post-COVID Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/care-post-covid.html> (updated Mar. 21, 2022)

# Status of OSHA's ETS





## Status of OSHA's ETS

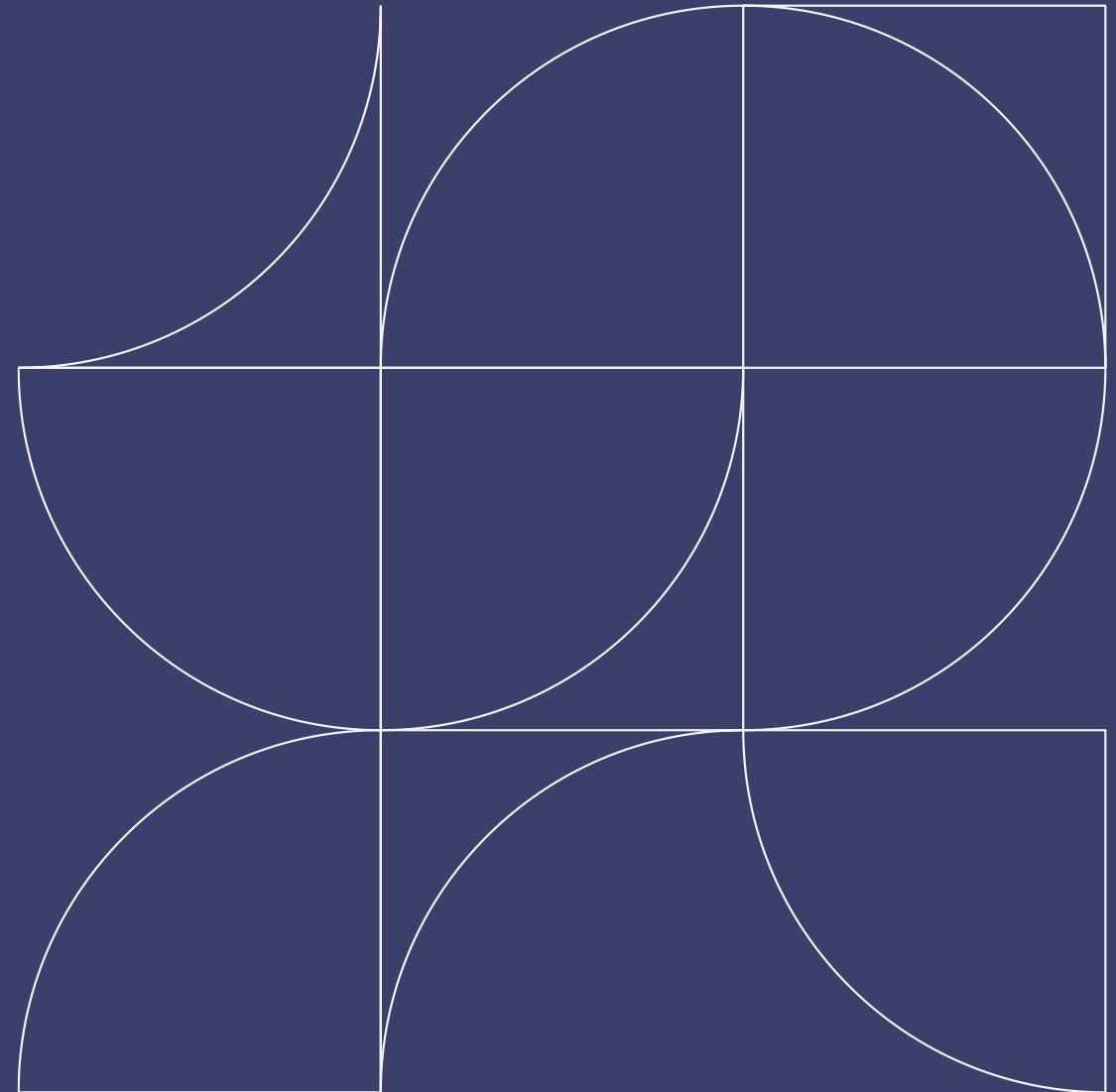
- On January 13, 2022, U.S. Supreme Court stayed enforcement of OSHA's COVID-19 Vaccination and Testing ETS, holding: "Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate."
- OSHA decided to withdraw the standard on January 25, 2022.
  - OSHA explicitly stated that ETS remains as a proposed rule for a permanent standard.
- On February 18, 2022, the Sixth Circuit granted the government's motion to dismiss the petitions challenging OSHA's ETS as moot.



## Status of OSHA's ETS (Cont.)

- 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.”

# What's next from OSHA?



## Status of OSHA's ETSs



- OSHA Vaccination and Testing ETS withdrawn by OSHA on January 25, 2022
- OSHA state plans governing private employers have not released vaccinate or test rules
- Vaccination and Testing ETS still on file as potential permanent standard
- OSHA Health Care ETS Expired December 21, 2022
  - Ongoing ETS or similar requirements in some state plans (e.g. TN)
- OSHA working on **COVID-19 Health Care and infectious disease permanent standards**



# 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



# 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>
- Certain existing regulations can be applied to COVID-19.
- National Emphasis Policy.
- COVID-19 healthcare permanent standard in the works



## 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

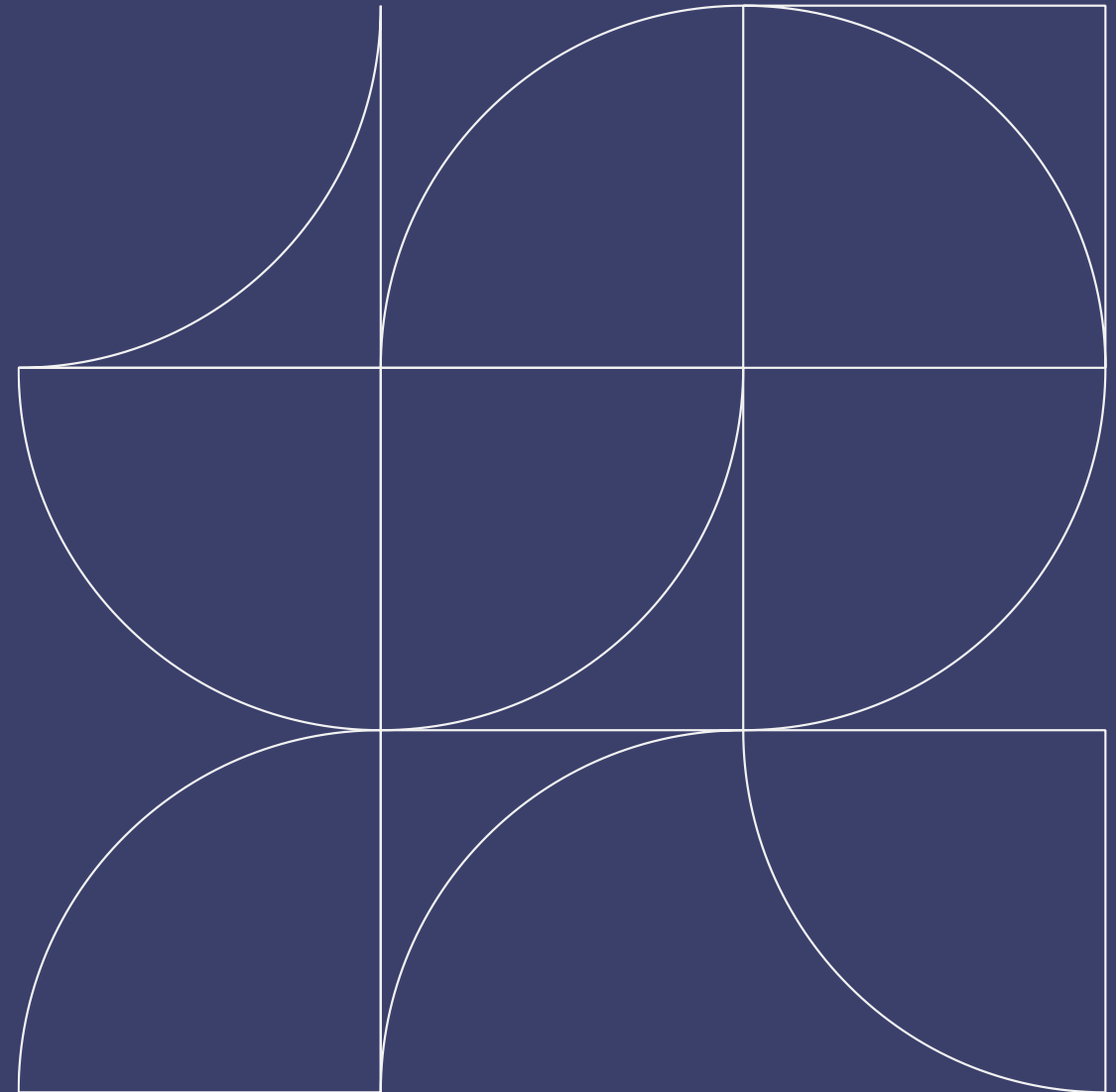
# Key Employer Tools and Options

---

- 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



# 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
- Five 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)
  - D. AZ (AZ, permanent injunction)
- 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
- Oral argument in 11th Circuit on April 8, 2022

# 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



- Injunctions do not impact agency/site-specific access requirements
- Example:
  - Force Health Protection Guidance (Supplement 20) Revision 1 - Department of Defense Guidance for Personnel Traveling During the Coronavirus Disease 2019 Pandemic (Jan 11 2022)
  - Vax or Test to enter DoD sites
- Rules continue to evolve



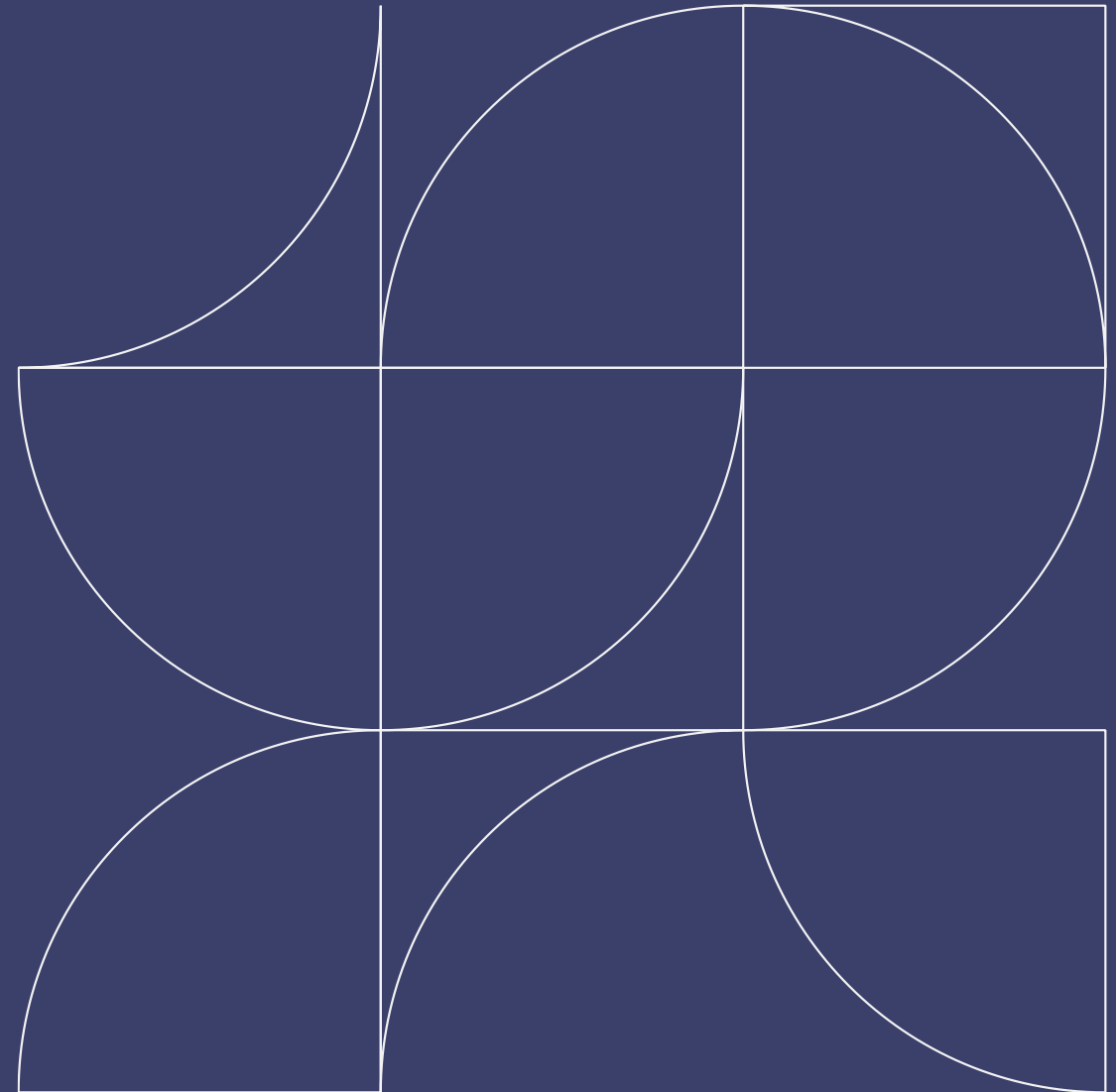
# What Contractors Should do While Litigation is Pending

---

- Get ducks in order in case injunctions lifted
- 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



# **CMS Rule – Who and How**



# Centers for Medicare & Medicaid Services (CMS) Rule

---

- HHS published vaccine mandate covering all eligible staff who work at health care facilities participating in Medicare / Medicaid (federally funded)
    - sets threshold conditions for participation in funding
  - **Phase 1:** Health care facilities must have vaccine policy
  - **Phase 2:** Health care employees must be vaccinated (unless granted exemption or if temporarily delayed per CDC)
  - Stayed in 25 states
  - SCOTUS lifted stay
- Nov. 5, 2021
  - Dec. 6, 2021
  - Jan. 4, 2022
  - Texas remains
  - January 13, 2022



***[P]roviders tak[ing] steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principal of the medical profession: first, do no harm.***

*Biden v. Missouri*, Nos. 21A240, 21A241, 2022 U.S. LEXIS 495, at \*3-4 (Jan. 13, 2022)



# Providers and Suppliers Subject to CMS Rule

## Clinics

- ambulatory surgery centers
- clinics, rehab, public health agencies as providers of outpatient PT/speech
- comprehensive outpatient rehab
- end-stage renal disease facilities

## Community

- community mental health
- intermediate care facilities for those with IDs
- Programs for All-Inclusive Care for Elderly (PACE)
- Psychiatric Residential Treatment
- Rural Health and FQHCs

## Hospitals

- critical access hospitals
- hospitals
- long term care facilities

## Home Health

- home health agencies
- home infusion therapy
- hospice

# CMS Health Care Staff Vaccination Mandate

---

- CMS issued Guidance (Jan. 14, 2022) updating compliance dates in the states that challenged the CMS Rule
- Shots were completed by March 15, 2022
  - By Feb. 13, 2022, covered facilities had to establish policy ensuring that all eligible staff received first dose of two dose vaccine or a one-dose vaccine prior to providing any care, treatment or service

## **Acceptable proof:**

- CDC COVID-19 vaccination record (or legible photo of card)
- documentation from HCP
- EHR
- state immunization information system record

# CMS Rule Enforced By On Site Survey Review:

## Vaccine Plan

- Plan for vaccinating all eligible staff to meet thresholds

## Accommodations

- plan to provide accommodations for those who are exempt

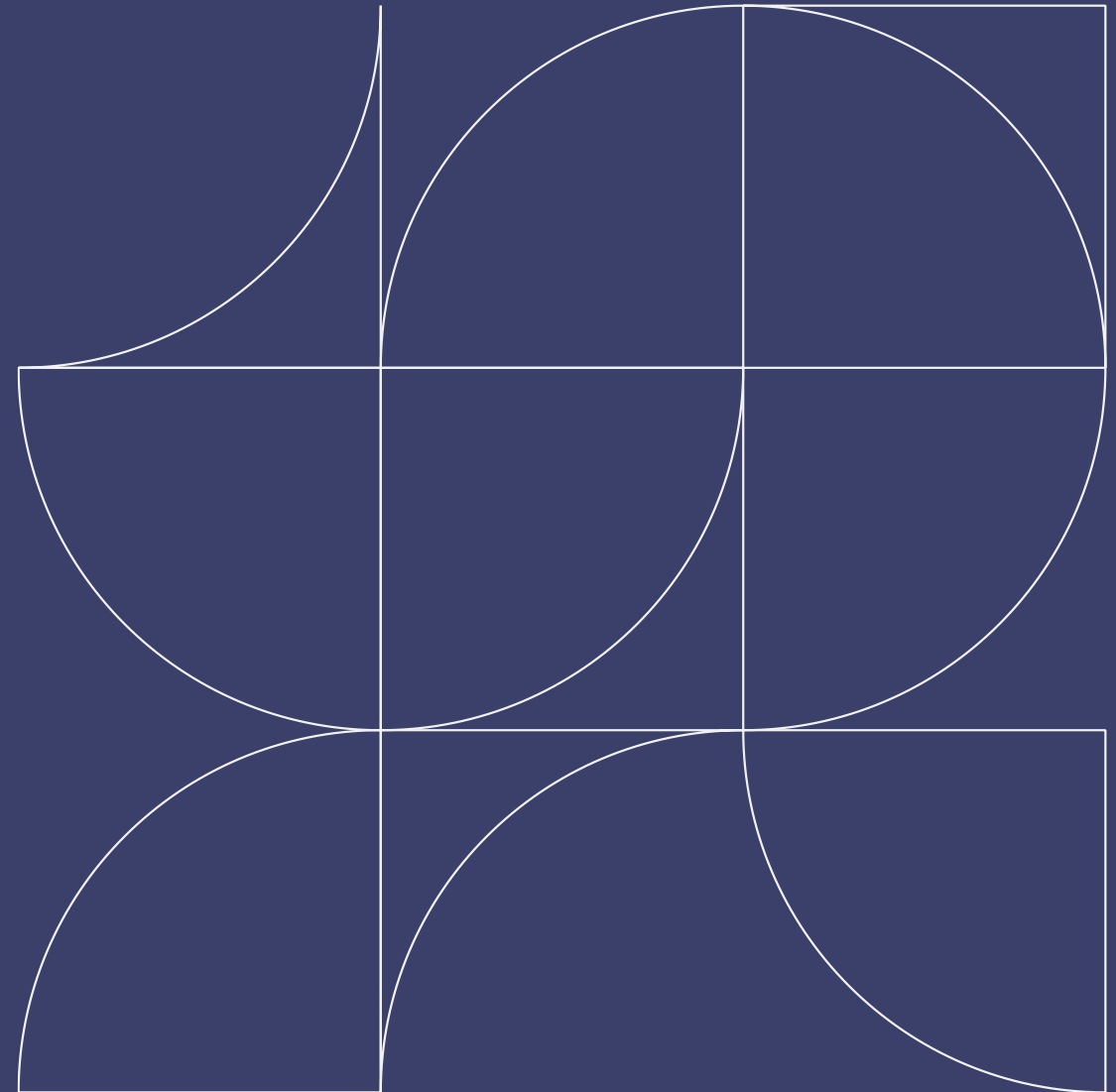
## Tracking

- plan for tracking and documenting staff vaccinations

## Consequences

- out of compliance facility is subject to citations if requirements not met
- facility citations (based on severity of deficiency)
- opportunity to come into compliance
- risk of additional enforcement or loss of Medicare/Medicaid payment

# Long COVID as a Disability





# What Is This Condition and What Is It Called

---

- Symptoms (new, ongoing, or current)
- Multiorgan Effects of COVID-19
- Effects of C-19 Illness or Hospitalization

CDC, *Post-COVID Conditions*, last updated Sept. 16, 2021

EEOC Technical Assistance, *what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws*, last updated March 14, 2022. See also

# Is Long COVID a Disability under the ADA?

---

- EEOC says it can be under any or all of the three prongs:
  1. “Actual” disability (duty to accommodate)
  2. “Record of” a Disability (duty to accommodate)
  3. “Regarded as” an Individual with a Disability (no duty to accommodate)
- Determinations must be made case-by-case depending on duration, severity, etc. Remember that even temporary conditions can be a covered disability.
- DOJ and HHS have also said long COVID can be a disability under ADA Titles II and III and Section 504 of the Rehabilitation Act.

# Accommodating Long COVID

---

- The usual ADA accommodation principles apply: the employee must generally request accommodation, the employer can require supporting medical documentation
- EEOC's suggested accommodations include schedule changes, physical modifications to the workplace, working remotely, or special/modified equipment. See EEOC Technical Assistance, *what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws*, last updated March 14, 2022.
- CDC says possible accommodations could include “flexible leave and work schedule policies, and by providing access to employee assistance programs.” CDC, Post-COVID Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html>, updated Sept. 16, 2021 (contains a step-by-step process for discussing long COVID with affected individuals to identify their concerns and needs)

# Other Resources for Accommodation and Generally

---

- CDC, Post-COVID Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html>, updated Sept. 16, 2021 (contains a step-by-step process for discussing long COVID with affected individuals to identify their concerns and needs)
- Caring for People with Post-COVID Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/care-post-covid.html> (updated Mar. 21, 2022)

**Thank you for attending**

