



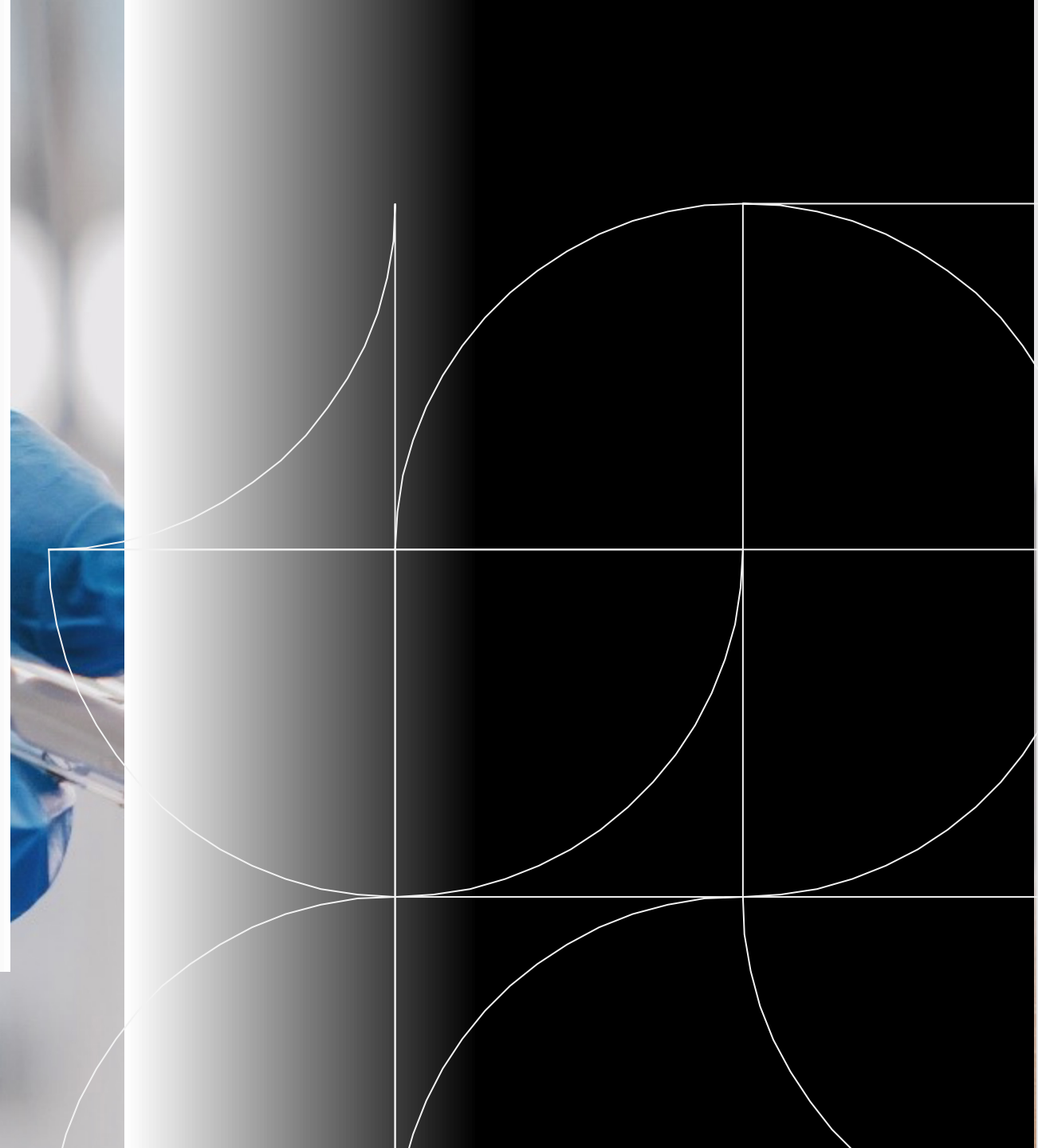
Vaccine Policies

and Implications of the Federal Mandates

October 6, 2021

Seyfarth Shaw LLP

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





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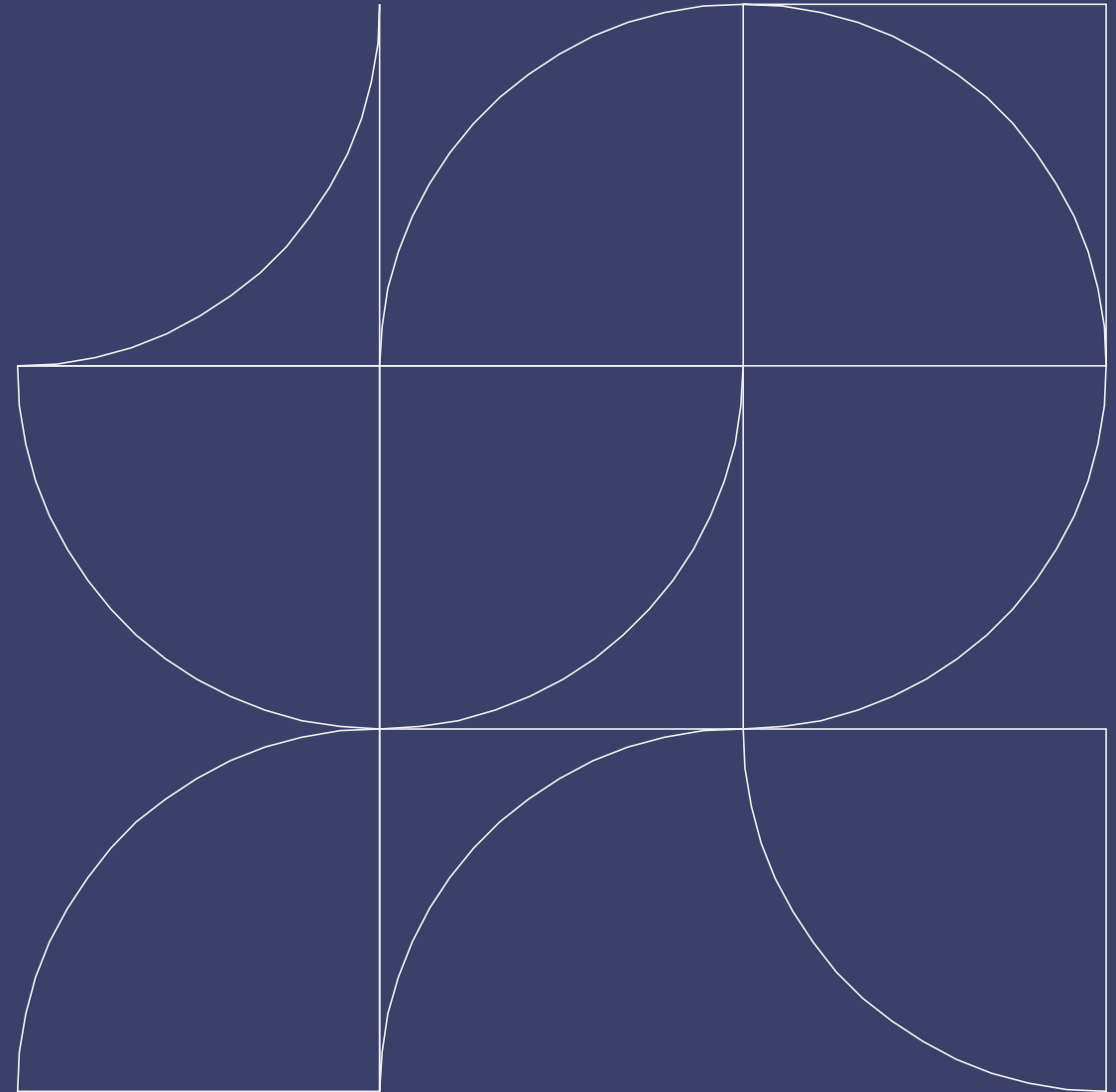
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AGENDA

- 1 | Vaccine Mandates and What They Mean
- 2 | Government Contracting Application and Implications
- 3 | Accommodations Strategies
- 4 | Practical Considerations

Vaccine Mandates and What They Mean





Biden Administration COVID-19 Action Plan

- On September 9, 2021, President Biden announced his six-pronged COVID-19 Action Plan.
 - Vaccinating the Unvaccinated;
 - Further Protecting the Vaccinated;
 - Keeping Schools Safely Open;
 - Increasing Testing & Requiring Masking;
 - Protecting our Economic Recovery; and
 - Improving Care for Those with COVID-19.
- **The First Prong: Vaccinating the Unvaccinated**
 - Requiring All Employers with **100+ Employees** to Ensure Employee Vaccination or Testing
 - Requiring Vaccination for Federal Workers and Certain **Federal Contract Employees**
 - Requiring Employers to Provide **PTO** for Employees to Get Vaccinated

Proposed OSHA

Emergency Temporary Standard



- All employers with 100 or more employees will have to require that workers:
 - Are vaccinated; or
 - Undergo weekly COVID-19 testing
- Employers can require vaccinations with no testing option
 - Subject to 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

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 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 as effective or more restrictive rule

Executive Orders 14042 and 14043

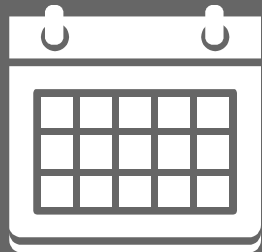
Ensuring Adequate COVID Safety Protocols for Federal Contractors

- Applies to procurement contracts for services, construction, or leaseholds in real property; SCA contracts; concessions contracts; and contracts for services on federal lands.
- Guidance required from the Safer Federal Workforce Task Force on September 24, 2021
- FAR Council required to issue a clause for contract incorporation by October 8, 2021
- Key date for implementation: October 15, 2021

Requiring Coronavirus Disease 2019 Vaccination for Federal Employees

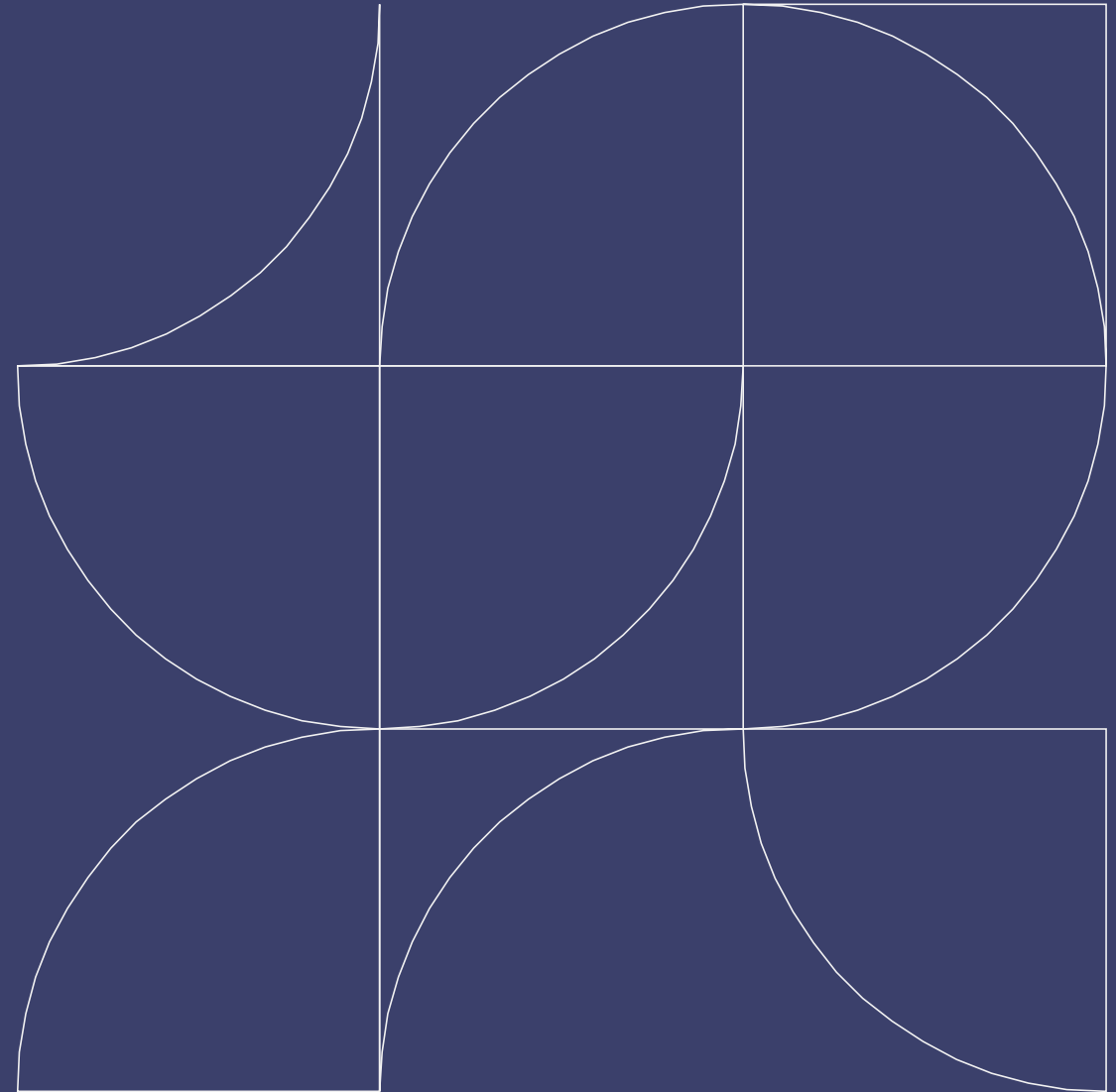
- Requires vaccination, subject to accommodations.
- Safer Federal Workforce Task Force has provided additional guidance
- Employees must be fully vaccinated November 22, 2021.
- Full vaccination means two weeks after receiving the requisite number of doses of an approved COVID-19 vaccine.

September 24, 2021 Safer Federal Workforce Task Force Guidance



- Covered contractors: primes and subs who are party to covered contracts.
- Covered contractor employees: any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. **This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.**
- Residences are not covered workplaces, **BUT remote workers are nonetheless subject to the vaccine mandate.**
- Requires vaccination – subject to accommodations - and documentation.
- Employee vaccination deadline of **December 8, 2021.**
- **Agencies are strongly encouraged to apply the Guidance into contracts that are not covered by the order, as well as into existing contracts and contract-like instruments prior to the date upon which the order requires inclusion of the clause.**

Government Contracting Application and Implications





FAR Council - 52.223-99

- To be inserted into covered federal contracts
- Individual Agencies have discretion as to when the clause is to be inserted into covered contracts – “Class Deviation”
- Recommended including the Clause in contracts beyond the scope of EO 14042 (including supply contracts and contracts under the simplified acquisition threshold (“SAT”) of \$250,000)
- Once inserted, contracts must comply with Sept 24 Task Force Guidance for vaccinations
- Final regulation is in process, but no timetable

FAR Clause - Deadlines



Clause Required for Services/Construction Contracts or Solicitations:

- **new contracts** awarded on or after November 14 from solicitations issued before October 15 (this includes new orders awarded on or after November 14 from solicitations issued before October 15 under existing indefinite-delivery contracts);
- **new solicitations** issued on or after October 15 and contracts awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15 for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- extensions or renewals of **existing contracts and orders** awarded on or after October 15, 2021; and
- options on **existing contracts and orders** exercised on or after October 15, 2021.

FAR Clause - Deadlines



Clause Required for Services/Construction Contracts or Solicitations:

- Existing Contracts - Contracting officers shall send a cover letter and modification request to add the clause for existing contracts including indefinite delivery, indefinite quantity (IDIQ) contracts, and contract-like, instruments.
- The cover letter, among other things, informs the contractor that the modification is strongly encouraged for contracts identified in the deviation. Also, it informs the contractor that the modification is mandatory before GSA will renew, extend the period of performance, or exercise an option for contracts subject to the deviation.
- Modification must be bilateral
- NOTE - Contracting officers shall not exercise an option period or extend the period of performance for existing contracts unless the contract has been modified to include the new clause.

Agency Deviations

GSA Deviation – When REQUIRED

- Contracts or contract-like instruments for services, construction, or a leasehold interest in real property exceeding the simplified acquisition threshold (SAT) or simplified lease acquisition threshold (SLAT);
- Services Contract Act
- Concessions
- Contracts or contract-like instruments entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, exceeding the SAT/SLAT



Agency Deviations

GSA Deviation – When **ENCOURAGED**

Strongly encourages contracting officers to include the Clause in all other contracts or subcontracts, including those under the **SAT** and for **supplies**.

- Supply Contracts Guidance – Federal Acquisition Services
- **GSA Federal Supply Schedules (“FSS”) and Blanket Purchase Agreements (“BPA”)** - GSA is requiring the Clause’s inclusion in all **new and existing** contracts, even in supply contracts.
- **Government-wide Acquisition Contracts (“GWACs”), Multi-Agency Contracts (“MAC”), and IDV/IDIQ contracts** - GSA is requiring inclusion of the Clause in all **new and existing** contracts, including contracts solely for supplies, except in a few limited contract types (e.g., non-FSS automotive), where it will only be strongly encouraged.
- After November 14, before placing an order, the CO shall review the contract to ensure that the clause at FAR 52.223-99 has been incorporated in the underlying contract. If the clause has not been incorporated in the contract, COs shall include the clause in the solicitation and resultant order, as applicable.



Agency Deviations

GSA Deviation – When **PRECLUDED**:

- Under the Micro-Purchase Threshold (\$10,000);
- For site acquisition;
- Concerning sales of surplus real and personal property;
- Regarding solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas); or
- With Indian Tribes under the Indian Self Determination and Education Assistance Act (Public Law 93-638) (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity)



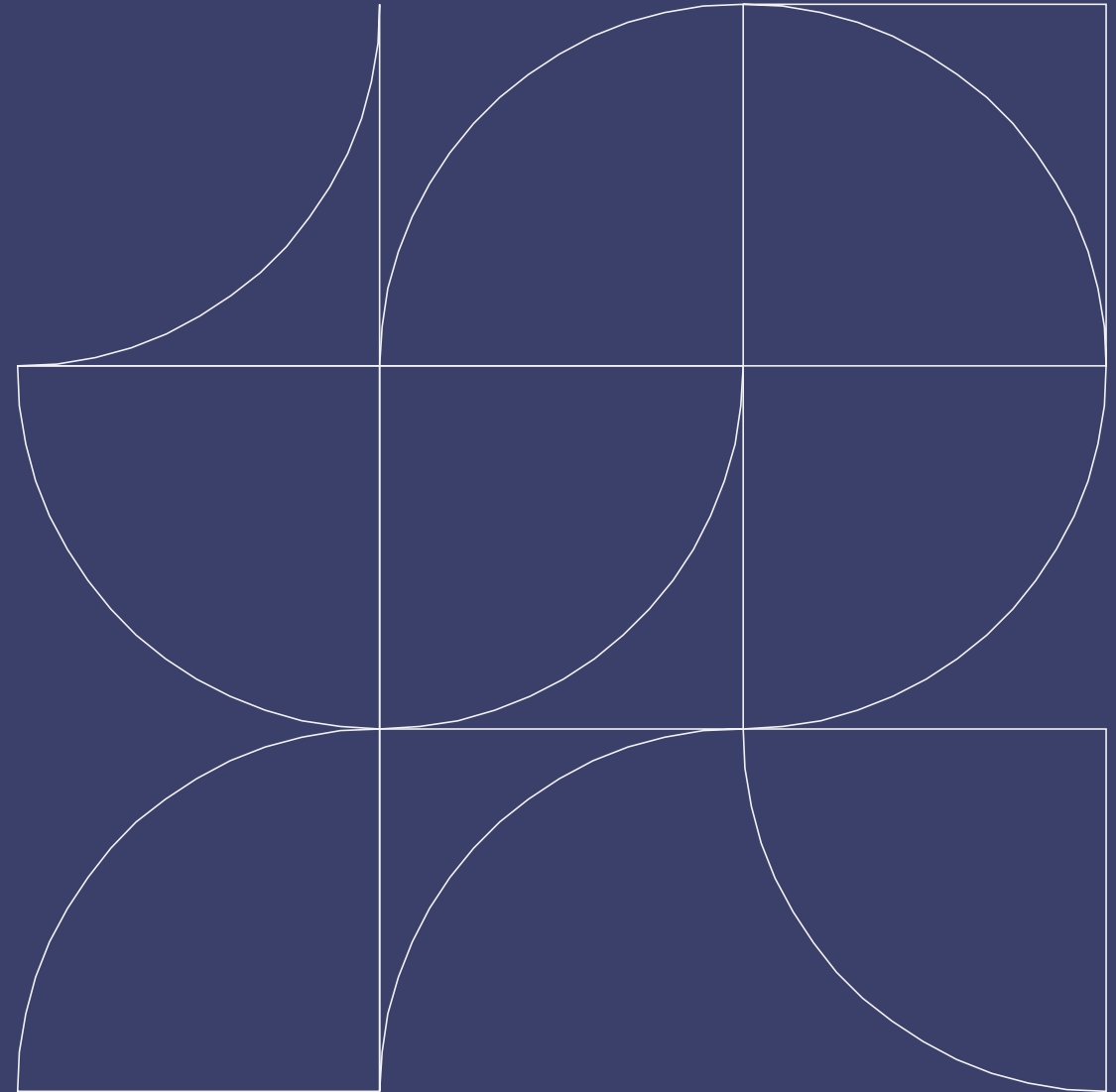
Risk of Non-Compliance



Penalties for Non-Compliance:

- Breach of Contract
- Termination for Default
- False Claims Act
- Suspension/Debarment
- CPARS

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

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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

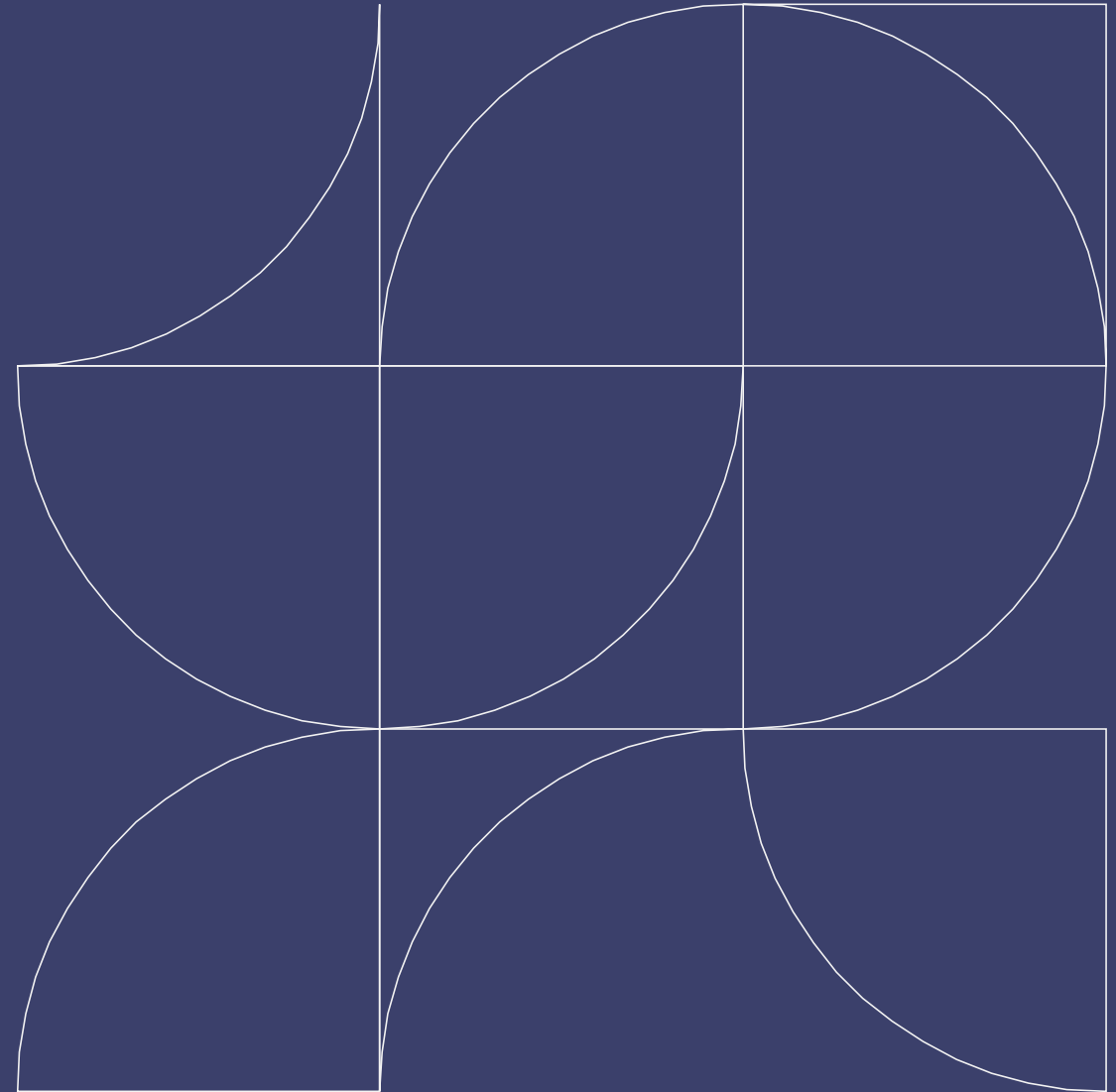
3. Communicate

- 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

Practical Considerations



Unified or Separate Policies

Considerations

Issues When Designing Policies

- Do you have clients mandating vaccinations?
- Do you have employees that travel to different states/localities? On short notice?
- Do you have some entities/locations that are covered by state or federal mandates, but not others?
- Are some positions easier than others to allow employees to remain unvaccinated?
- Administrative, manager, and safety team ability to track different requirements?

Testing As An Option

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

Union Issues

- Duty to bargain over implementation of vaccination mandate
- Even if governmental entities or customers require vaccines, employers must bargain with unions about implementation
 - Provide notice and opportunity to bargain to union explaining the mandate and its origins
 - Explain mandate timelines and ask to bargain during that window
- Likely bargaining topics
 - Who is subject to vaccination mandate
 - Timing and manner of vaccination
 - How employees provide proof
 - Compensation for time spent getting vaccinated and/or recovering
 - Consequences for refusal to submit to vaccination

Non-Union Issues

- Even non-union employees who engage in collective/concerted activity are protected by the NLRA
 - Can strike, handbill, demand more money or time off to be vaccinated as a group, and employer cannot interfere, restrain, or retaliate
 - Employees cannot just ignore rule; insubordination unprotected
- Consider how instituting/implementing mandate may affect any union organizing activities in the workplace

**Thank You for
Attending**

