

# Litigation Update on Vaccine Mandate Challenges

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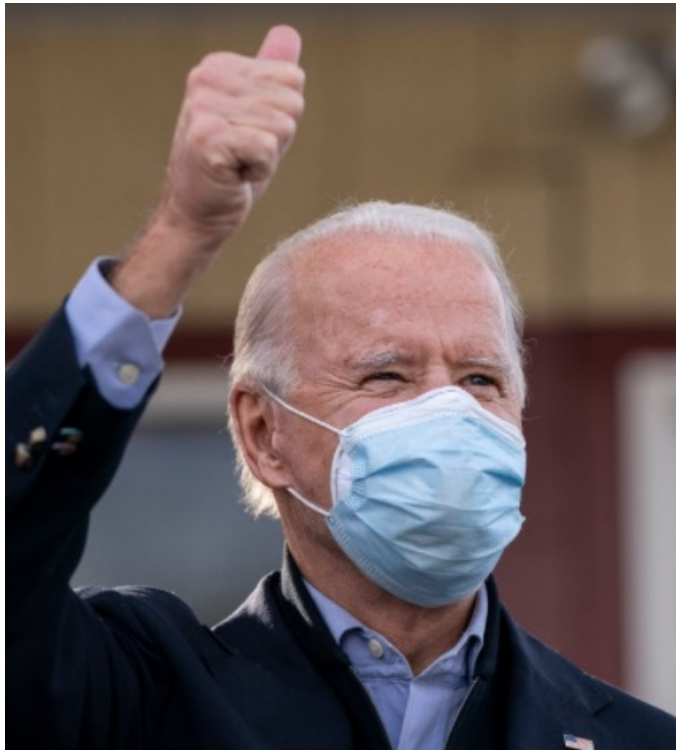
# Friendly Reminder from the Sheppard Mullin Office of General Counsel

*This presentation is provided for information purposes only and does not constitute legal advice and is not intended to form an attorney client relationship. As you are aware, things are changing quickly. This presentation does not reflect an unequivocal statement of the law, but instead represents our best interpretation of where things currently stand. This presentation does not address the potential impacts of the numerous other local, state, and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay, and other issues.*

# Agenda

- Basic Requirements of EO 14042
- Key Terms and Compliance Considerations
- Bases of Legal Challenges
- Current Litigation Status
- Crystal Ball Predictions
- Best Practices for Mitigating Risk

# President Biden on September 9, 2021



“I will sign an executive order that will now require all executive branch Federal employees to be vaccinated — all. And I’ve signed another executive order that will require Federal contractors to do the same.

If you want to work with the Federal government and do business with us, get vaccinated. If you want to do business with the Federal government, vaccinate your workforce.”

# Three Complementary Vaccination Mandates



Executive Order  
14042



Occupational  
Safety and  
Health  
Administration  
Emergency  
Temporary  
Standard



Centers for  
Medicare &  
Medicaid  
Services Rule





BRIEFING ROOM

## Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

SEPTEMBER 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and section 301 of title 3, United States Code, and in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce, it is hereby ordered as follows:

**Section 1. Policy.** This order promotes economy and efficiency in Federal

procurement by ensuring that the parties to the contract provide adequate COVID-19 safeguards for their workforce. This order promotes economy and efficiency in Federal procurement by ensuring that the parties to the contract provide adequate COVID-19 safeguards for their workforce. This order promotes economy and efficiency in Federal procurement by ensuring that the parties to the contract provide adequate COVID-19 safeguards for their workforce.

**Sec. 2. Providing for Adequate COVID-19 Safety Protocols for Federal Contractors and Subcontractors.** (a)

including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and section 301 of title 3, United States Code, and in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce, it is hereby ordered as follows:

### Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors Issued September 24, 2021

#### Introduction

On September 9, President Biden announced his [Path Out of the Pandemic: COVID-19 Action Plan](#). One of the main goals of this science-based plan is to get more people vaccinated.

As part of that plan, the President signed Executive Order 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). ("the order") which directs executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. § 102(4)(A), to ensure that covered contracts and contract-like instruments include a clause ("the clause") that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force ("Task Force"), provided that the Director of the Office of Management and Budget ("OMB") approves the Task Force Guidance (the or this "Guidance") and determines that the Guidance, if adhered to by covered contractors, will promote economy and efficiency in Federal contracting.

The actions directed by the order will ensure that parties who contract with the Federal Government provide COVID-19 safeguards in workplaces with individuals working on or in connection with a Federal Government contract or contract-like instrument. These workplace safety protocols will apply to all covered contractor employees, including contractor or subcontractor employees in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument. These safeguards will decrease the spread of SARS-CoV-2, the virus that causes COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors performing work for the Federal Government.

Pursuant to this Guidance, and in addition to any requirements or workplace safety protocols that are applicable because a contractor or subcontractor employee is present at a Federal workplace, Federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

# E.O. 14042 Key Documents

- **Executive Order (Sept. 9)**
  - Established basic parameters of mandate
  - Authorized the Safer Federal Workforce Task Force to develop binding implementation guidance
  - Directed the FAR Council to policy direction for FAR deviations
- **Safer Federal Workforce Task Force Guidance (Sept. 24)**
  - Provided key definitions and exemptions
  - Established safety protocols: vaccinations, masking, physical distancing
  - Developed staggered timeline for implementation
  - Included *strong encouragement* for agencies to include the requirements in ALL contracts, regardless of EO applicability
- **FAR Council and Agencies (Sept. 30)**
  - Developed dynamic contract clauses
  - Issued deviations explaining agency implementation

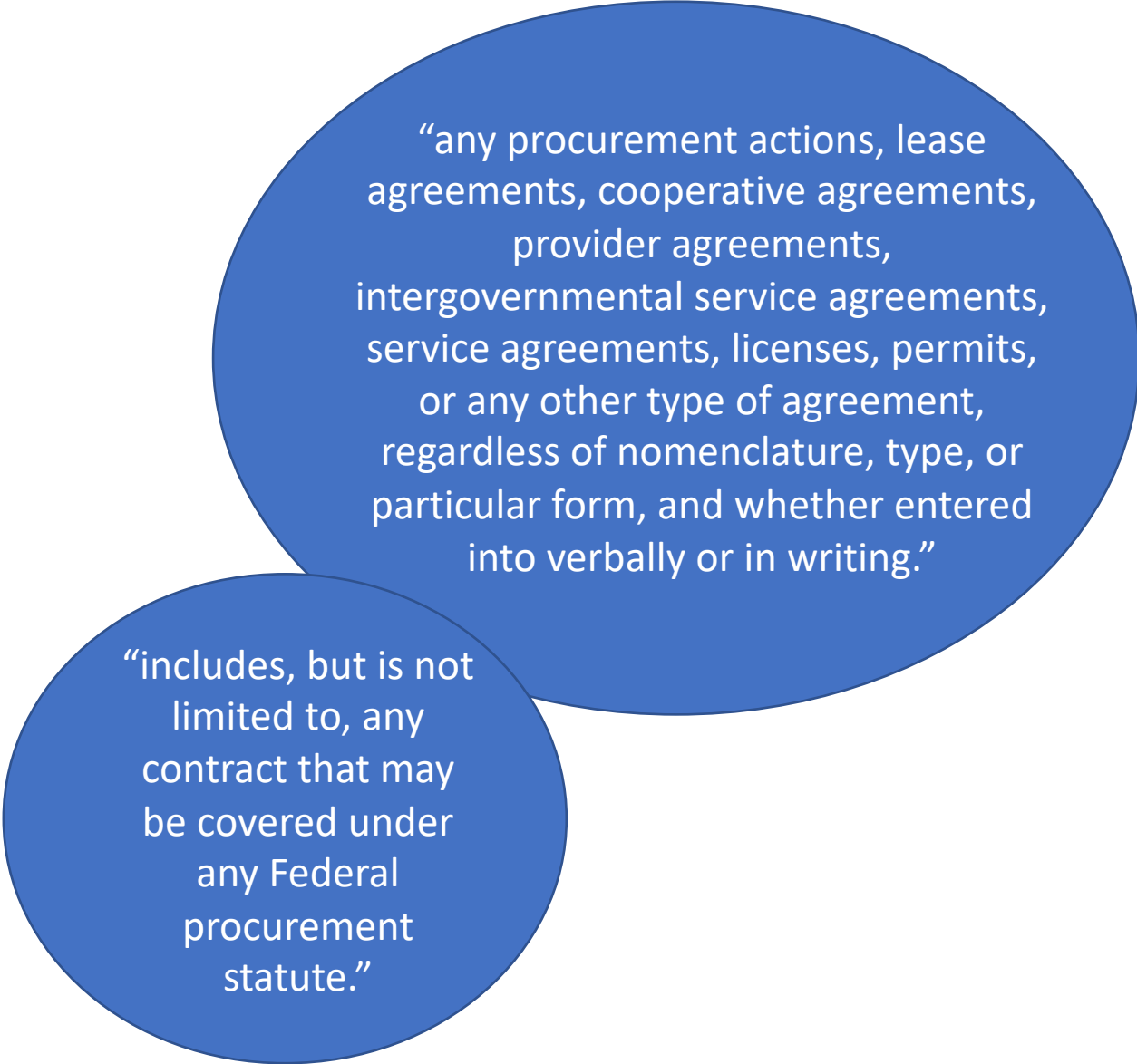
# Task Force Guidance Key Terms

- Contract and contract-like instruments
- Covered contractor
- Covered contractor employee
- Covered contractor workplace



# Contracts and contract-like instruments

- Very broadly defined
  - Any type of agreement with the Federal Government
  - Excludes grants
- BUT, contract must be within scope



“any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing.”

“includes, but is not limited to, any contract that may be covered under any Federal procurement statute.”

## Covered Contractors

A prime contractor or subcontractor at any tier *that is a party* to a covered contract.

## Scope: What types of contracts are covered?

1. Contracts for services, construction, or a leasehold interest in real property;
2. Contracts covered by the Service Contract Act;
3. Contracts for concessions, including any concessions contract excluded by DOL regulations; and
4. Contracts 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.

# The Spectrum of Services



Davis Bacon  
Act



Service  
Contract Act



People-  
Based  
Services



Non-People  
Based  
Services

# Covered Contractor Employee

- 1) Employees *directly* working on a covered contract;
- 2) Employees *indirectly* supporting a covered contract; and
- 3) Employees of the *covered contracting entity* who work in a *covered contractor workplace*

# When is an Indirect Employee a *Covered* Indirect Employee?

- Working “in connection with”
  - “Employees who perform duties *necessary to the performance* of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract”
  - Examples provided: Human Resources, Billing, Legal

## Compliance Approaches

Conservative
All employees

Middle Ground
Employees with some nexus to covered contracts

Aggressive
Only employees who perform indirect work exclusively for covered contracts

# Covered Contractor Workplaces



Covered contractor-controlled facilities



Includes covered contractor-controlled *outdoor* facilities



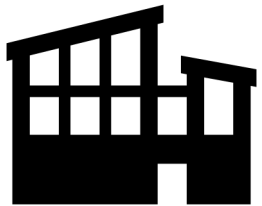
Where any employee working on or in connection with a covered contract is ***likely to be present***



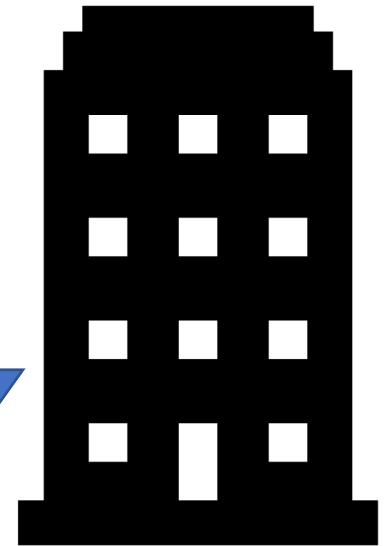
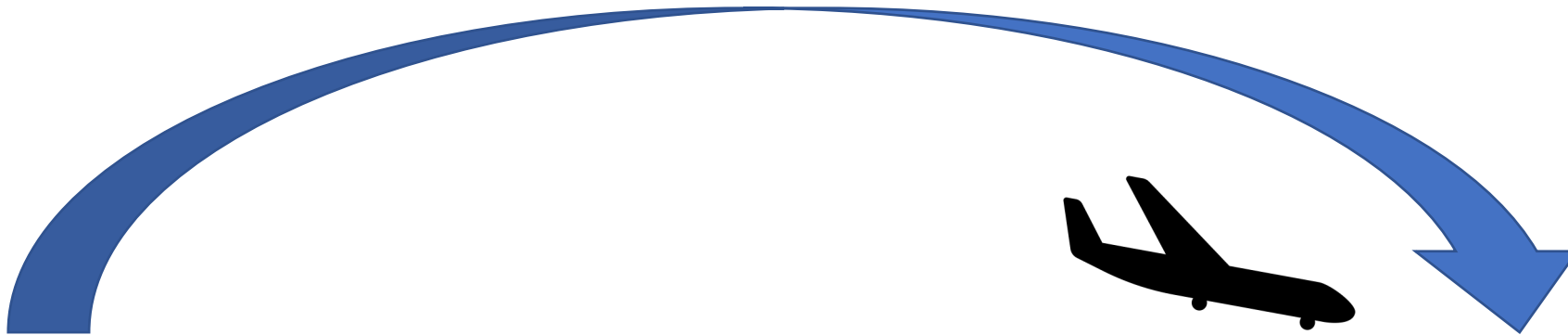
Limited exception for facilities with fully separate areas



# The jet-setting in-house counsel...



Field Office



HQ

# Key Safety Protocols and Requirements

Vaccinations

Masking/Physical Distancing

Visual Inspection of Proof of  
Vaccination

**Subcontractor Oversight**



Subcontractor vs. Vendor

# To Flowdown or Not to Flowdown

## Subcontractors

- Performing a portion of a PWS
- Performing for the exclusive benefit of a single contract

## Vendors

- Utilities
- Food Services
- Janitorial Services
- Landscaping Services
- Law/Accounting/Consulting Firms

## Potential Tests

- A. Is the company providing a function that is necessary to the performance of a Federal contract?
- B. Is the company providing services that have a direct nexus to a Federal contract?
- C. Is the company providing services intended for use across both Federal and non-Federal contracts?

# Legal Challenges

- All three mandates have been challenged in Federal court (and each in *multiple* Federal courts)
- Federal District Courts, Courts of Appeals, and the Supreme Court have weighed in on the various mandates
- Are all EO 14042 roads leading to the Supreme Court?

# Injunctions, Injunctions, Injunctions...

## EO 14042

- Nov. 30: Enjoined in Tennessee, Kentucky, and Ohio (E.D. Ky.)
- Dec. 7: Enjoined nationwide (S.D. Ga.) (later clarified that injunction applies only to vaccine mandate, not masking/distancing)
- Current Status: Enjoined nationwide pending Circuit Court review; appeals at 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 11<sup>th</sup> Circuits

## OSHA ETS

- Nov. 6: 5<sup>th</sup> Circuit issued temporary stay nationwide injunction
- Nov. 12: 5<sup>th</sup> Circuit issued nationwide preliminary injunction
- Dec. 17: 6<sup>th</sup> Circuit reverses 5<sup>th</sup> Circuit; ETS back in effect
- Dec. 20: SCOTUS sets briefing schedule
- Jan. 7: SCOTUS oral argument
- Current Status: SCOTUS enjoined enforcement on Jan. 13; ETS withdrawn Jan. 26; Final Rule in process

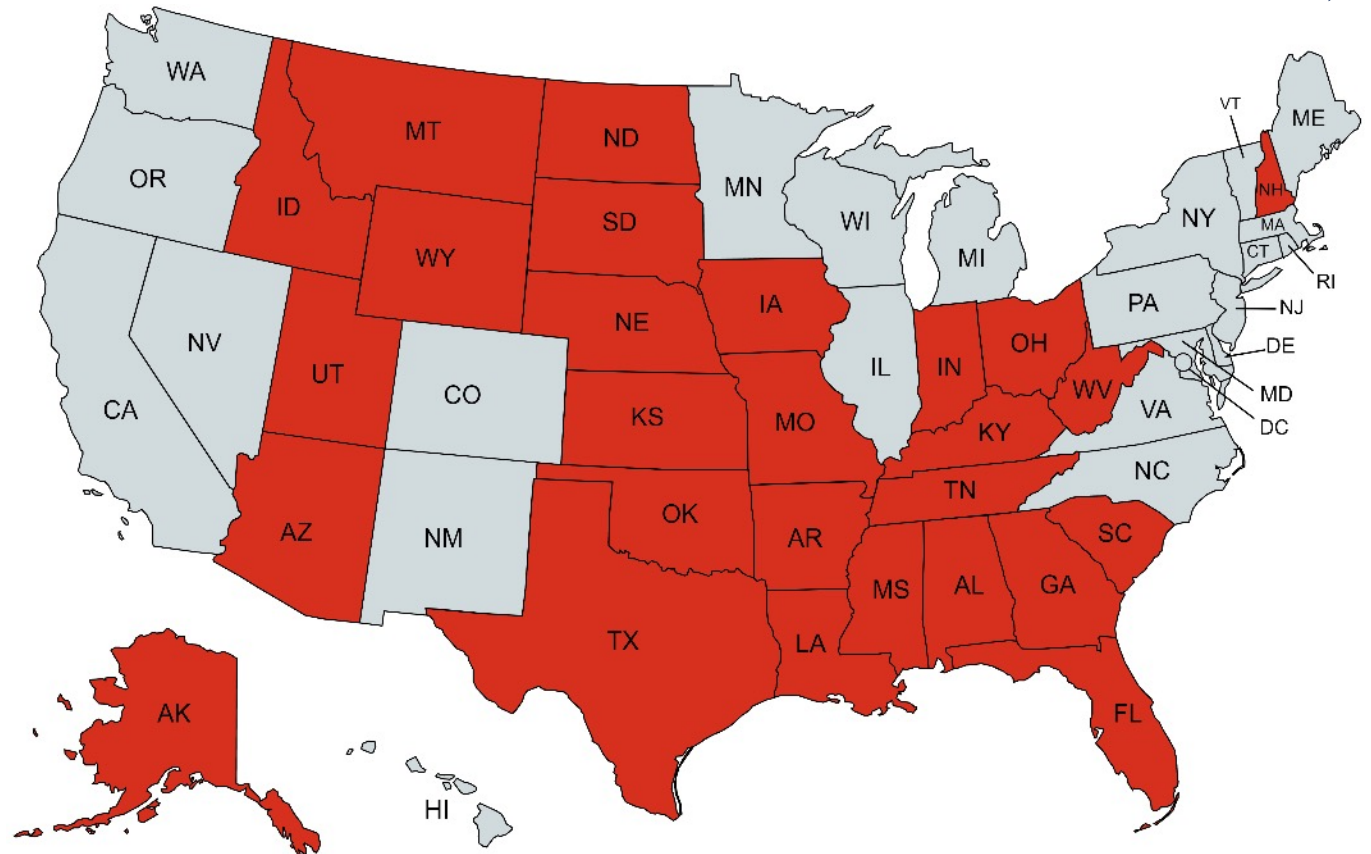
## CMS Rule

- Nov. 29: Enjoined in AK, AR, IA, KS, MO, NE, NH, ND, SD, and WY
- Nov. 30: Enjoined nationwide
- Dec. 15: Nationwide injunction stayed. Preliminary injunction affirmed for AL, AZ, GA, ID, IN, KY, LA, MS, MT, OH, OK, SC, TX, UT, WV
- Jan. 7: SCOTUS oral argument
- Current Status: SCOTUS dissolved injunction on Jan. 13; CMS Rule in effect nationwide



# Challenges to E.O. 14042

- Fourteen lawsuits filed in Federal District Courts
- Plaintiffs include
  - 27 states
  - Individuals employed by Federal contractors
  - Trade associations
- Subsequent appeals to Circuit Courts



# Legal Bases of Challenges to E.O. 14042

## Violation of Federal Statutes

- Federal Property and Administrative Services Act
- Competition in Contracting Act
- Administrative Procedure Act

## Violation of the U.S. Constitution

- Non-Delegation Doctrine
- 10<sup>th</sup> Amendment

# District Court Decisions

## Georgia

United States is enjoined “during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America.”

## Florida

“[T]he defendants are PRELIMINARILY ENJOINED from enforcing within Florida any contract clause requiring compliance with the COVID Safety Protocols for Federal Contractors described in Executive Order No. 14042...”

## Missouri

“Defendants are enjoined from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming.”

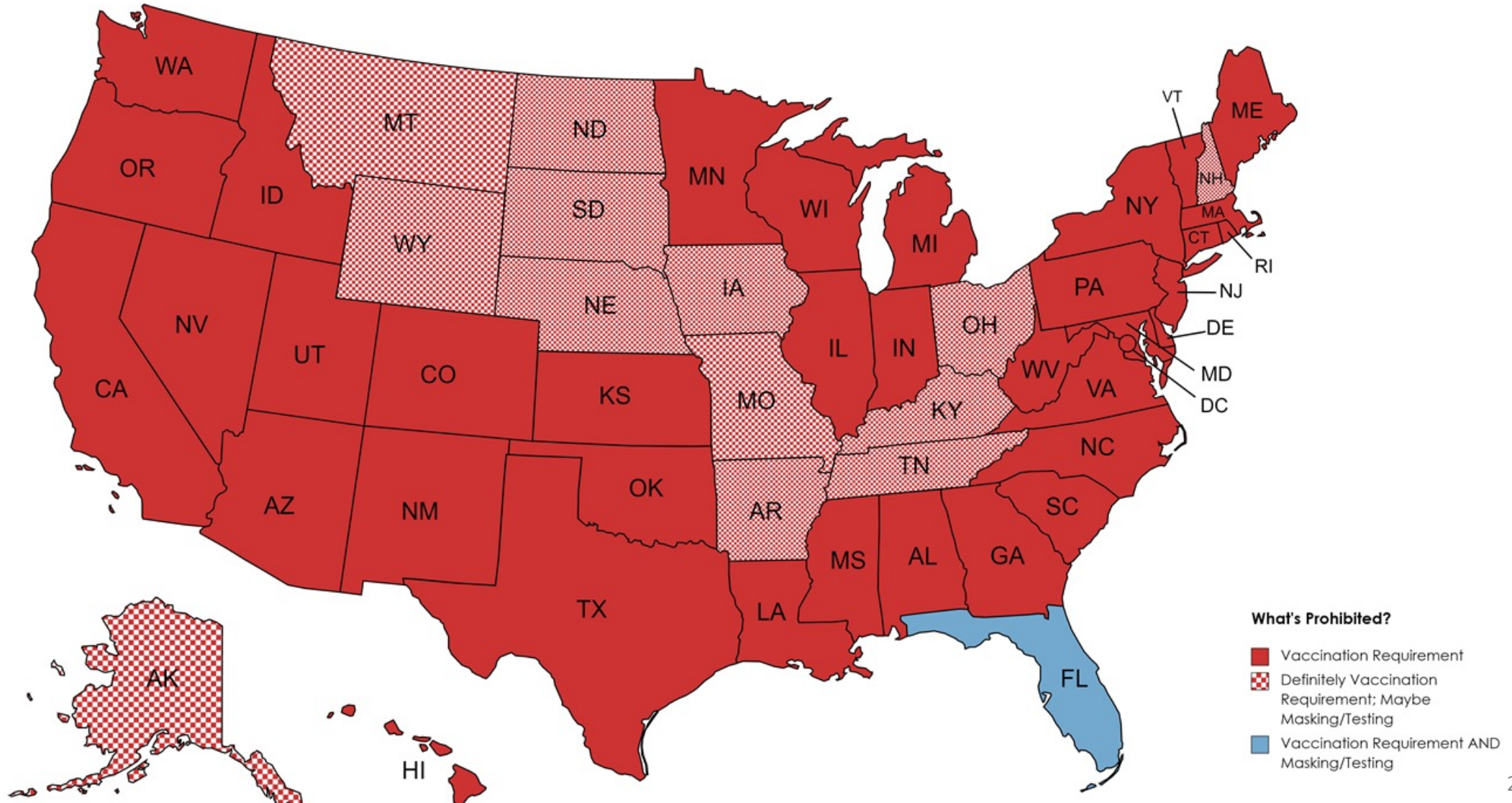
## Louisiana

“[I]t is ORDERED that the Motion for Preliminary Injunction, Doc. 22, is GRANTED to enjoin the national government from enforcing the Task Force Guidance and FAR Memo in any contract, grant, or any other like agreement by any other name, whether for services or product and whether existing or new, between the Plaintiff States or their agencies and the national government.”

## Kentucky

“The Government is ENJOINED from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.”

# Current EO 14042 Enforcement Status



# The Race of the Circuits

- EO 14042 currently under review at four Courts of Appeals
- Appeals are proceeding on *slightly* different timelines
- 11<sup>th</sup> Circuit (appeal of the Georgia District Court decision) has oral argument scheduled first





# Current Litigation Status on the Appellate Level

Parties	Circuit	Status
Louisiana v. Biden	5 <sup>th</sup>	USG brief deadline extended to 4/13/22
Kentucky v. Biden	6 <sup>th</sup>	USG reply brief deadline extended to 4/13/22
Missouri v. Joseph Biden, Jr.	8 <sup>th</sup>	USG brief deadline extended to 4/11/22
Georgia v. President of the United States	11 <sup>th</sup>	Oral argument scheduled for 4/8/22



# Do All Roads Lead to SCOTUS?

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- Challenges to all three mandates involve *both* statutory interpretation and constitutional issues
- Litigation filed *nationwide*
- *Extremely* political issue
- Though, no Circuit Court split (yet)...



# A Case Study: Executive Orders 13769/13780

January 27, 2017:	Executive Order issued
February 7, 2017:	Challenge filed in Maryland
March 6, 2017:	Revised Executive Order announced
March 15, 2017:	Maryland District Court issues injunction
May 25, 2017:	4 <sup>th</sup> Circuit upholds injunction
June 26, 2017:	SCOTUS issues partial ruling
September 24, 2017:	Third version of the Executive Order announced
October 18, 2017:	Maryland District Court enjoins third version of the Executive Order
December 4, 2017:	SCOTUS permits ban to take effect pending appeals
February 15, 2018:	4 <sup>th</sup> Circuit again upholds injunction
April 25, 2018:	SCOTUS oral argument
June 26, 2018:	SCOTUS upholds third version of the Executive Order



# Mitigating Risk In The Face Of EO 14042 Uncertainty

- DO NOT undue prior efforts, but DO give serious consideration to pausing all EO 14042 compliance efforts
- ADHERE to state laws applicable in states where your employees work to ensure you do not run afoul of those prohibitions (now that they are not preempted by the EO)
  - Particularly important as states/localities roll back mask mandates
- COMMUNICATE with employees regarding status of your company's current EO compliance plans
- PAUSE efforts to incorporate the FAR/DFARS clause in subcontracts

# Contractor Personnel Performing at a USG Facility

- When the COVID-19 Community Level is **MEDIUM** or **HIGH** in a county where a Federal facility is located, agencies should:
  - about the vaccination status of contractor employees working onsite at that facility;

Questions?





# Thank You!



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