



# High Stakes: Making Sound Decisions for Your Business as COVID-19 Continues

Presented by Benjamin Briggs



*This program has been approved for 1 Business recertification credit hours toward PHR, SPHR and GPHR recertification through the HR Certification Institute.*



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# Speaker

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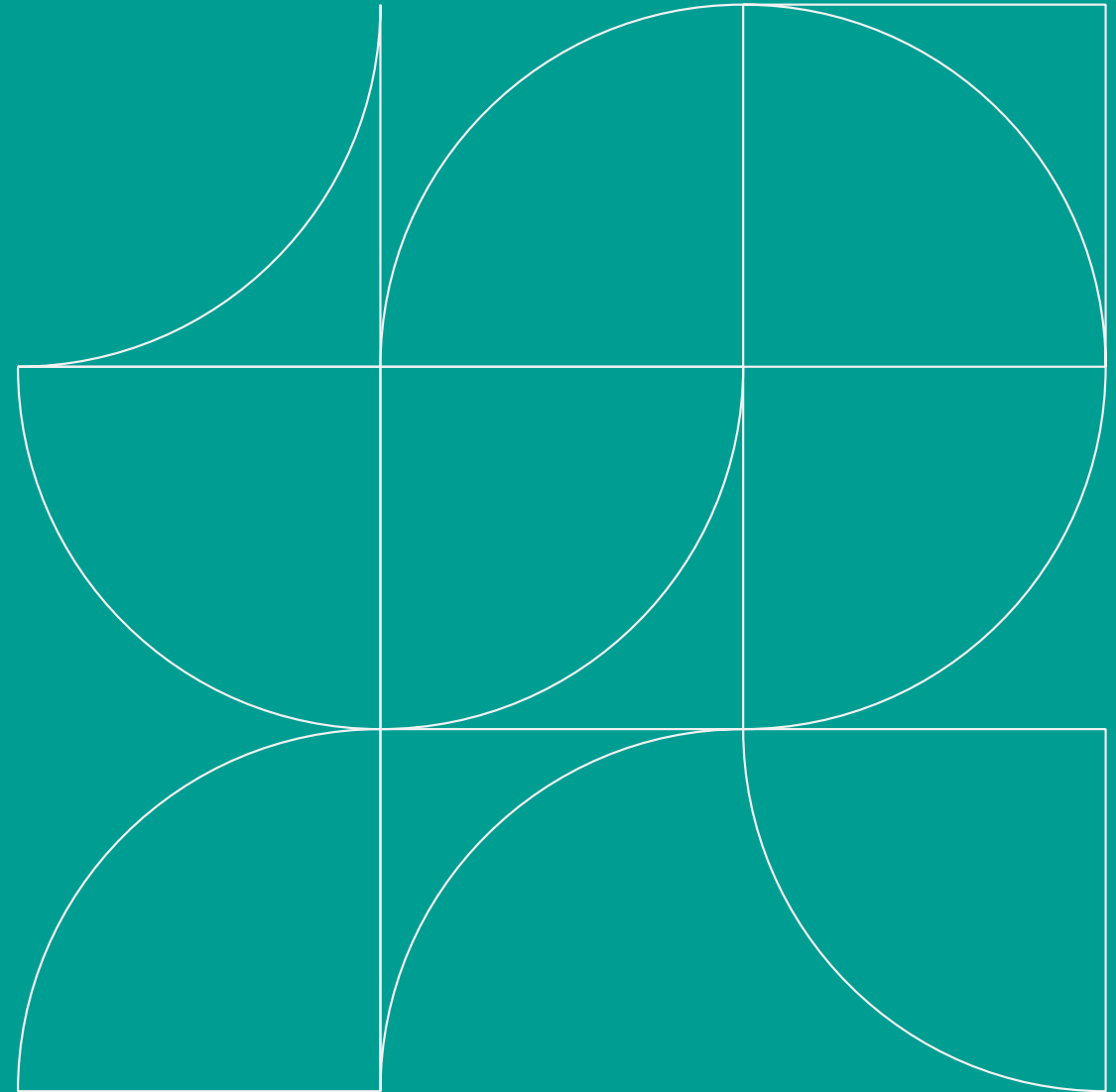
Benjamin Briggs

# Agenda

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- Current state of the pandemic
- Vaccine mandates and what they mean for employers
- Accommodation strategies
- Remote work considerations

# Current State of the Pandemic

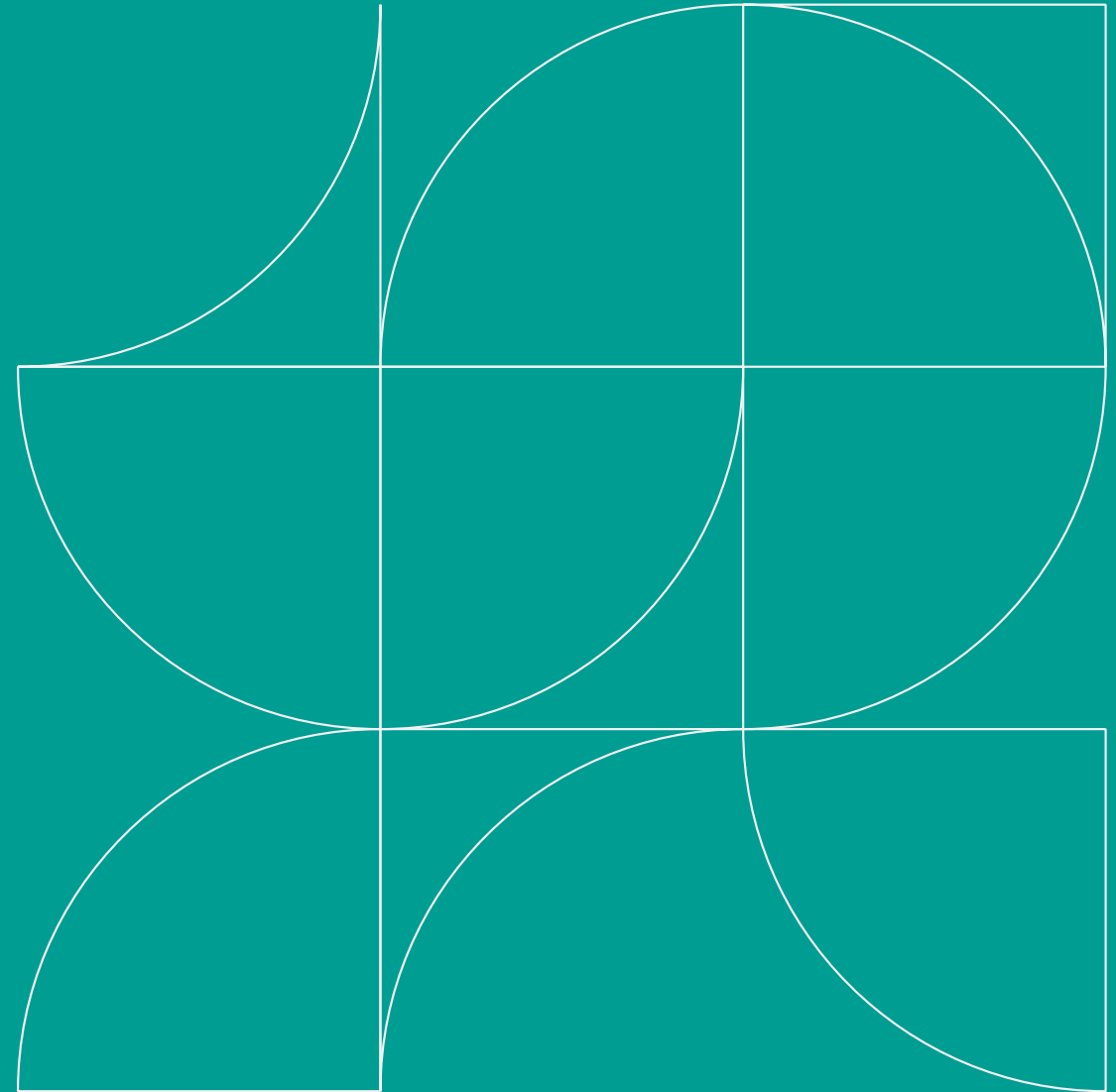


# Current State of the Pandemic

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- Confirmed cases, deaths and hospitalizations.
- % of people 12 and older who are vaccinated.
- Moving away from “encouraging” vaccine toward mandatory vaccine or testing option programs.
- Impact of the Delta Variant on the “Honor System.”

# Vaccine Mandates and What They Mean



# Biden Administration COVID-19 Action Plan

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- 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
  - 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

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- 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

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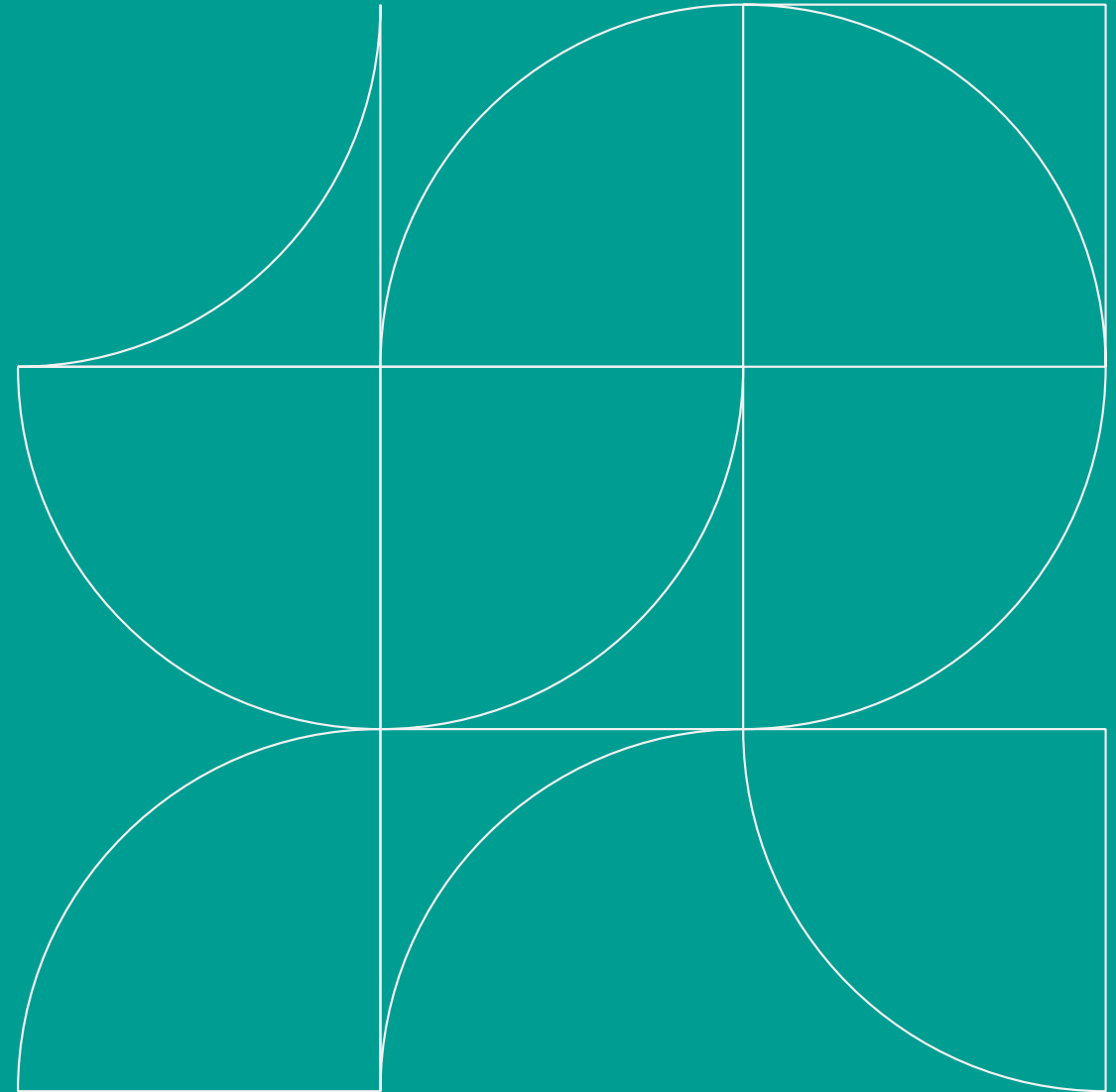
- **Ensuring Adequate COVID Safety Protocols for Federal Contractors**
  - Applies to procurement contracts for services, construction, or leaseholds in real property; SCA contracts; concessions contracts; and contracts for services on federal lands.
  - Guidance required from the Safer Federal Workforce Task Force on September 24, 2021.
  - FAR Council issued a clause for contract incorporation on October 1, 2021.
  - Key date for implementation: October 15, 2021.

# September 24, 2021 Safer Federal Workforce Task Force Guidance

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- 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.**

# Accommodation Strategies



# Accommodation Issues

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- **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?

# Accommodation 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.*

# Accommodation 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



# Accommodation Issues – Set Up Your System

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## 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

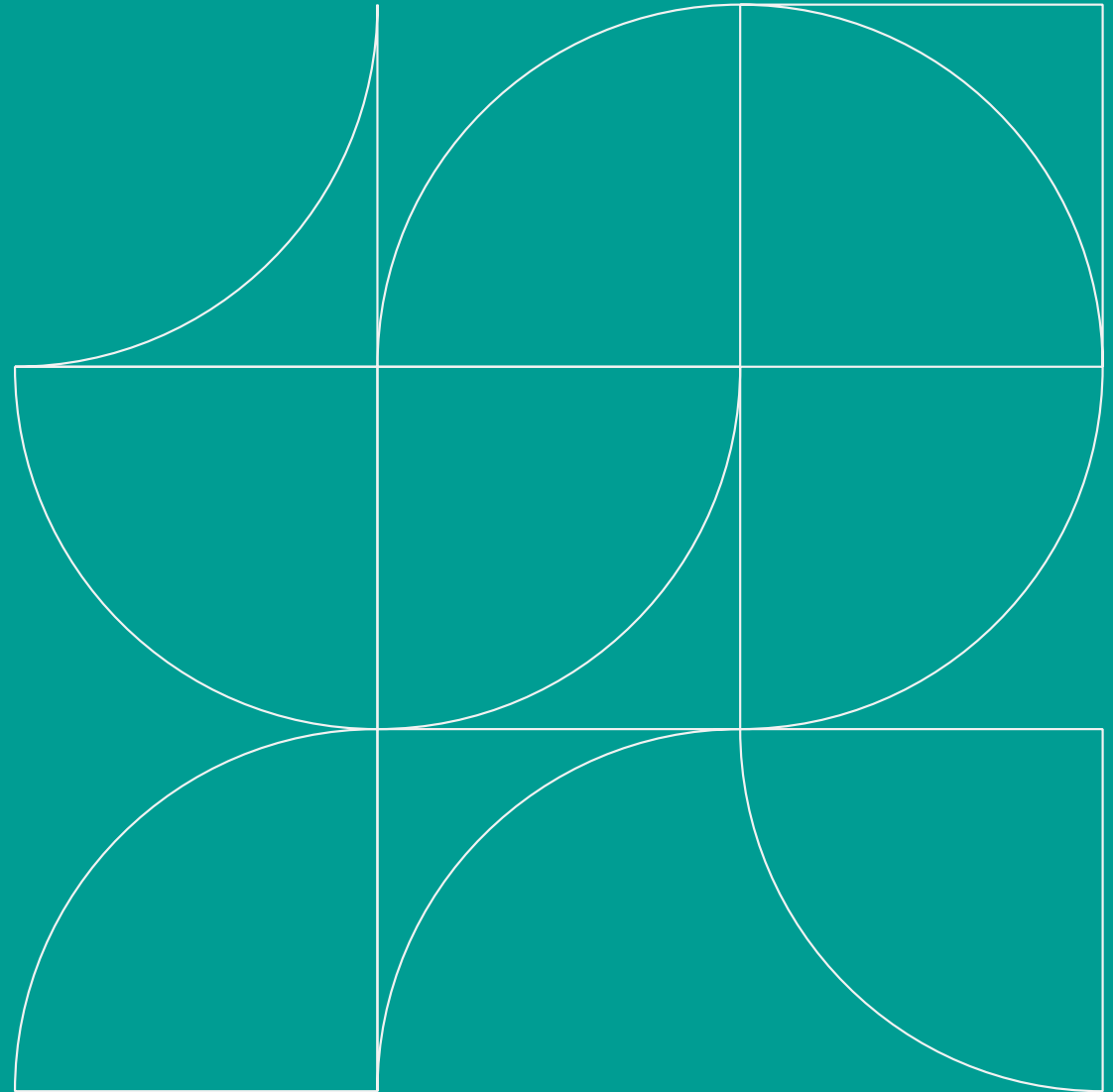
- **Implementing Accommodations**
  - Masking
  - Frequent testing
  - Closed offices, partitions, distancing
  - Remote work
  - Modified shifts or reassignment
- **Options Where No Reasonable Accommodations?**
  - Temporary job alteration
  - Leave of absence
  - Termination

# Accommodation Issues: Testing

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

# Remote Work Considerations



# Remote Work Considerations: Legal

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- Does mobility mean more onerous employment laws are implicated for the business?
- Wage-Hour and “Off-the-Clock” Risk?
- Do local or state laws require expense reimbursement?
- Restrictive covenants and maintaining confidentiality of information?
- Registration with agencies (i.e., unemployment) and Notice to Insurers (i.e., WC)?
- State tax obligations?
- Workers’ compensation and health and safety

# Remote Work Considerations: Practical

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- Firm/business culture
- Impact on connection and collaboration amongst employees
- Productivity
- Performance management
- Employee retention – many prefer remote or hybrid
- Shrinking real estate footprint and cost
- Fear of return to the workplace



# Any Questions?



**Thanks for joining us!**



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