



**GIBSON DUNN**

**COVID-19 Vaccines: Employer Strategies and Considerations in the Era of Government Mandates**

Jessica Brown  
Lauren J. Elliot  
Jodi Juskie, Keysight Technologies

October 20, 2021

# Today's Presenters



**Jessica Brown**  
*Denver*  
*Partner, Gibson Dunn*

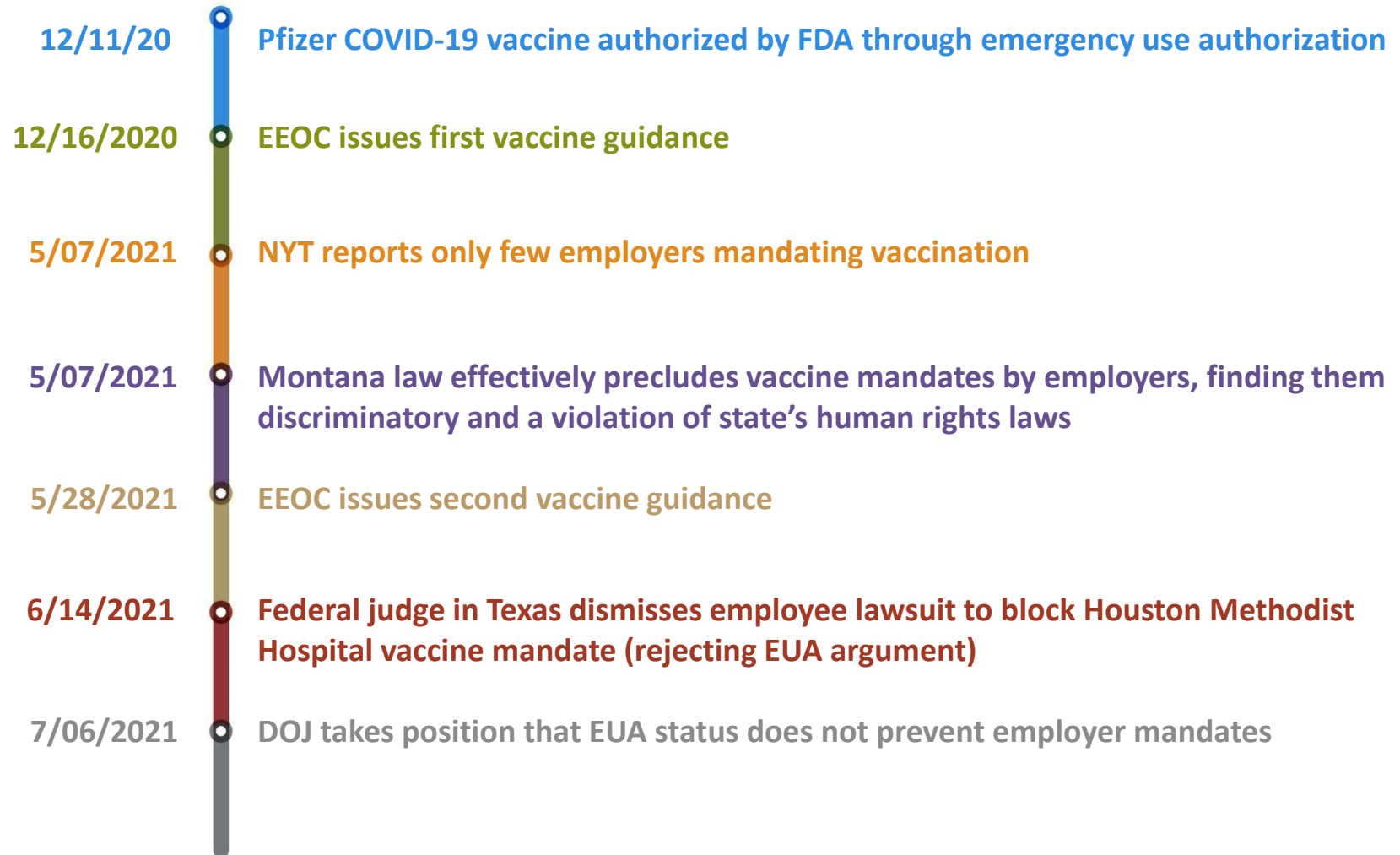


**Lauren Elliot**  
*New York*  
*Partner, Gibson Dunn*

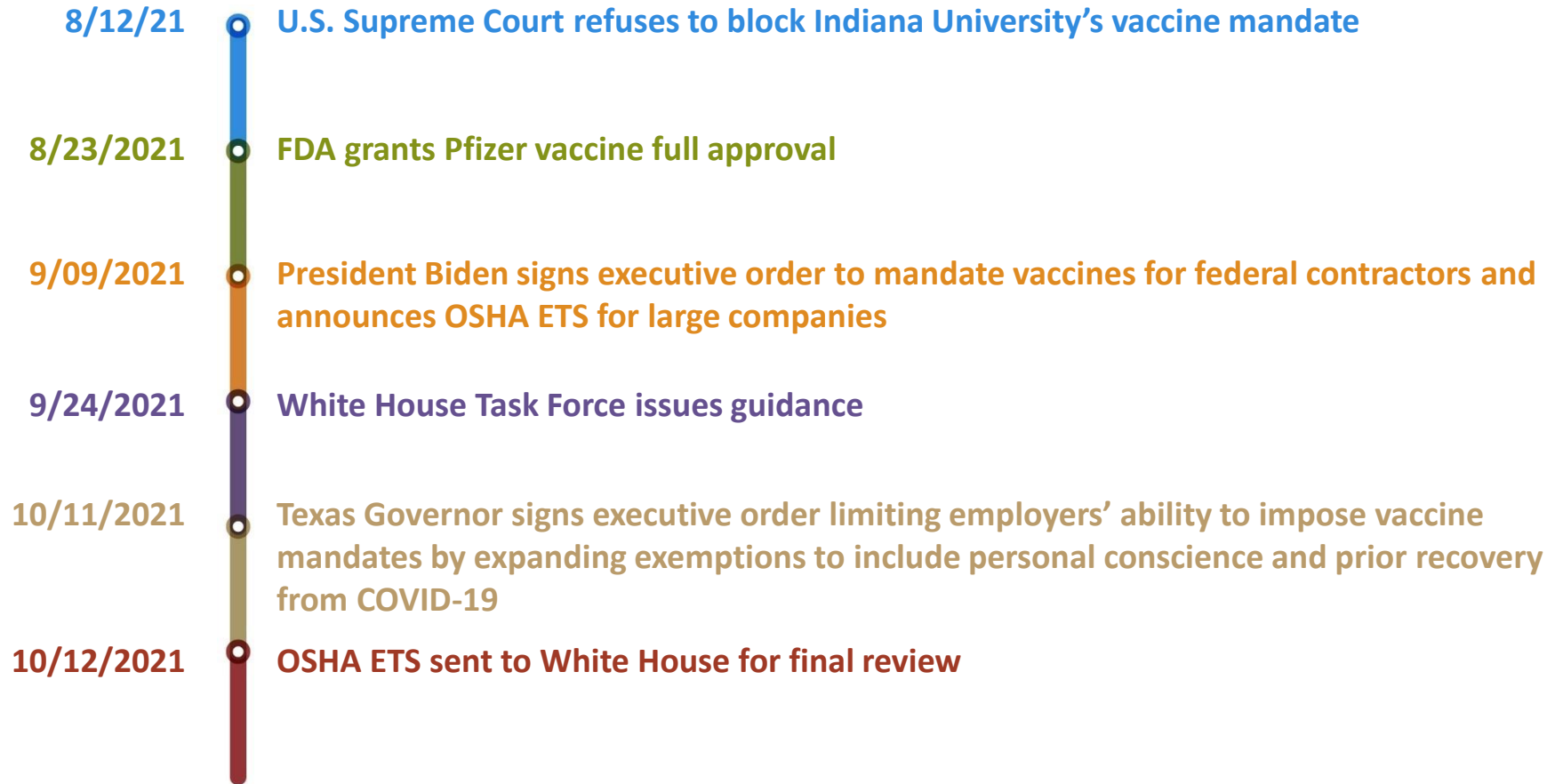


**Jodi Juskie**  
*Vice President and*  
*Assistant General Counsel,*  
*Keysight Technologies*

# Vaccine Timeline



# Vaccine Timeline



# Voluntary Mandates on the Rise over the Summer

- Even before the federal mandates were announced in early September, many more employers were starting to mandate voluntarily
- Delta variant spurred many to do so, in combination with other factors, e.g.:
  - Houston Methodist case in June
  - DOJ opinion in July
  - Indiana University case in August
  - Large employers setting the example

# Executive Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

- Effectuated by directing federal agencies to include a contract clause requiring compliance with Safer Federal Workforce Task Force guidance
- Requires the clause to be included in four types of “covered contracts”
- Vaccine mandate applies to all “covered contractor employees” meaning “any full-time or part-time employee” working ...
  - on a covered contract *or*
  - “in connection with” a covered contract *or*
  - at a “covered contractor workplace”

# Federal Contractor Mandate

- Broad applicability of Executive Order No. 14042:

“In connection with” and “covered contractor workplace” definitions are very broad

Many remote employees are swept in as well

Some contractors will mandate more broadly than necessary, given the wide reach of the requirements

Others will carve out locations where no one who works on or in connection with a covered contract is likely to be present

# Federal Contractor Mandate

## Vaccine Mandate

- “Covered contractor employees” must be fully vaccinated by December 8
- Includes those who previously had COVID-19
- Includes remote employees working from home
- Exception for employees who are “legally entitled to an accommodation” for medical or religious reasons
- Covered contractor is responsible for determining what, if any, accommodations to offer
- Contractor is not responsible for providing vaccines (but may choose to)
- Contractor is not instructed to pay employees for their time to get vaccinated
- But the OSHA ETS is expected to require this
- State law may require this as well





# Federal Contractor Mandate

## Physical Distancing and Masks

- Fully vaccinated employees are not required to distance
- Unvaccinated employees should maintain six feet of distance
- In areas of high community transmission (per CDC), everyone must mask indoors
- In areas of low community transmission, only the unvaccinated must mask indoors (and outdoors in some circumstances)
- Contractors are responsible for checking CDC website weekly
- Masking for vaccinated employees not required after 2 consecutive weeks of low or moderate transmission



# Federal Contractor Mandate (cont'd)

## Safety Coordinator Requirement

- Responsible for coordinating, implementing, and enforcing compliance
- Must provide relevant information to employees and visitors likely to enter a covered contractor workplace
- Responsible to ensure employees show proper proof of vaccination
- Silent as to whether a coordinator is required for each worksite

# OSHA Emergency Temporary Standard



- Draft ETS went to the White House for review on October 12
- Anticipated to require employers with 100 or more employees to require vaccination or weekly testing
- Will require employers to pay for employees' time to be vaccinated and to recover from side effects
- Will remain in place for six months; will face legal challenges

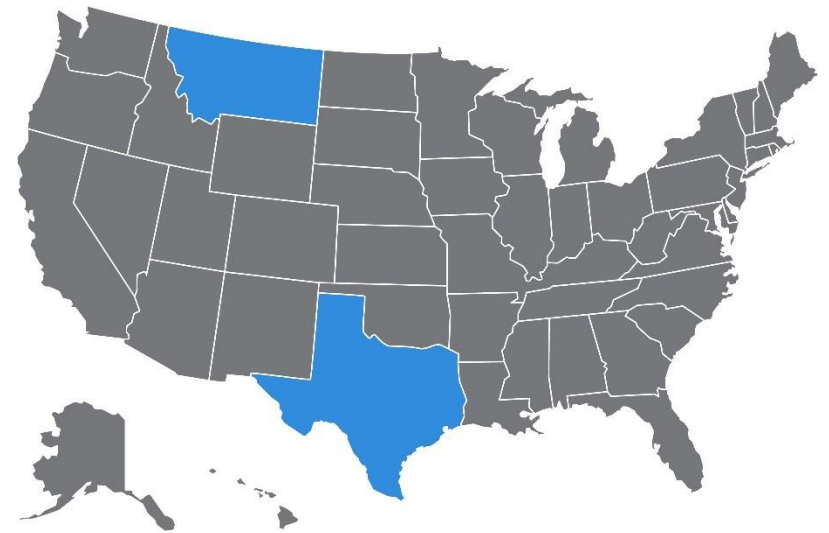
# OSHA Emergency Temporary Standard

Numerous questions may be answered soon, e.g.:

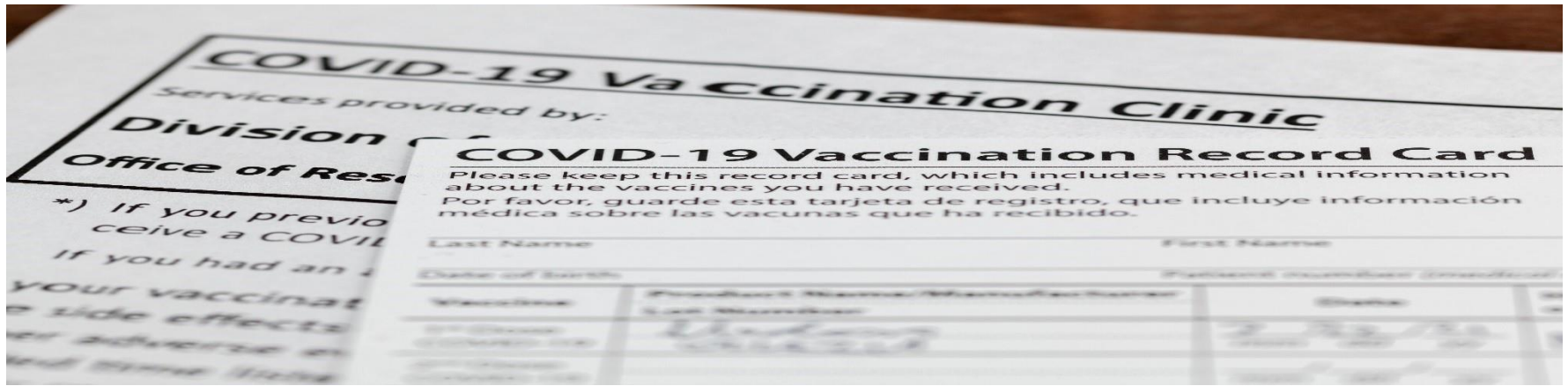
- How will the 100-employee threshold be determined?
- Who pays for testing?
- Can employers just mandate (versus affording a testing option)?
- Will remote workers need to be vaccinated or test? If testing, how often?
- What proof (vaccination, test results) will be required?
- Can employees be required to use existing PTO to be vaccinated?
- Does the ETS explicitly preempt or “supersede” less protective state laws?
- Is there guidance regarding consequences to employees who refuse?
- Is there a masking or distancing requirement, as for contractors?
- Does the ETS address union negotiations/CBA requirements?
- What about data privacy requirements?
- What will be the consequence to employers for compliance failures?

# Voluntary Mandates

- Generally optional, apart from federal contractors, “large” employers (100+), many healthcare workers
- Pros and cons remain largely the same as set forth in our Playbook last December
- Must abide by more restrictive state and local laws
  - Montana made unvaccinated workers a protected class in early May
  - Texas expanded permissible bases for requesting exemptions this month
    - reasons of personal conscience
    - “natural immunity”



# Collection and Handling of Vaccine Information



## Proof of Vaccination

- Questions about vaccine status, including requests for proof of vaccination, are allowed. They are not medical exams or disability-related inquiries under ADA.
  - Copy of CDC COVID-19 Vaccination Record Card
  - Visual inspection of CDC COVID-19 Vaccination Record Card

# Collection and Handling of Vaccine Information

- But written documentation of vaccine status (proof of vaccination) is a confidential medical record under ADA and state medical privacy laws
  - Maintain separate from employee's personnel file and payroll records and protect against unauthorized access internally or externally
    - Store in a secure location (consider encryption, avoid shared folders or unprotected platforms)
    - If stored electronically, implement separate access protocols
    - If hard copies are maintained, store in a locked filing cabinet
    - Limit access on need-to-know basis
  - May use third-party provider to collect and maintain proof of vaccination (and testing)

# Proof of Vaccination Requirements for Contractors

- Contractors must review and verify, but not necessarily collect or store, proof of vaccination
- Safety Coordinator is responsible for ensuring employees show or provide proper vaccination documentation
- Acceptable documents include:
  - physical or electronic CDC cards
  - state health records
  - private medical records
- Unacceptable documents include:
  - positive antibody tests
  - self-attestations



# Navigating Reasonable Accommodations

## Medical Exemptions

- Under the ADA, if an employee seeks a medical exemption, the employer must engage in an “interactive process” to arrive, if possible, at a “reasonable accommodation.”
  - Unless known or obvious, employers can request documentation for a health care provider
  - May ask about the condition requiring the exemption and whether it is temporary or permanent
- Reasonable Accommodations for Medical Exemption
  - Must “reasonably” accommodate the disability AND
  - Must not impose an “undue hardship” on the employer’s finances or operations
    - Causes “significant difficulty or expense” OR
    - Poses direct threat to health and safety that cannot be sufficiently mitigated

# Navigating Reasonable Accommodations

## Religious Exemptions

- Under Title VII, an employee can seek an accommodation based on sincerely held religious beliefs or practices
  - Includes religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others
  - Does not include personal preferences or political, economic, or social beliefs (such as “vaccines are dangerous,” “employers cannot require employees to be vaccinated,” belief that vaccine contains a microchip).
- A belief should not be questioned or rejected merely because it does not fit into the scriptures, teachings, or doctrines of a traditional organized religion.

# Navigating Reasonable Accommodations

## Verification of Religious Exemptions

- “[I]f the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee’s claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation.”
  - Very little verification required
  - Can be a letter from a pastor or just a family member or friend who is familiar with the employee’s belief system
    - Reports of certain pastors selling such letters for \$100.
    - Internet forms also available regarding fetal stem cell objections
  - Should you challenge the sincerity of the religious belief? Per the EEOC, there needs to be an “objective basis for questioning either the religious nature or sincerity of particular belief”

# Navigating Reasonable Accommodations

## Reasonable Accommodation for Religious Exemptions

- Silver lining for employers?: Employer “undue hardship” under Title VII is less demanding than under ADA: “de minimis” burden or expense.
- But state law may impose a higher standard – similar to ADA
- Seeing a wide range of reactions and approaches from employers to requests for religious accommodations
- EEOC has said to look at their guidance outside the vaccine context – has been encouraged to issue additional guidance soon

# Reasonable Accommodations for Contractors

- Task Force provided little guidance to contractors
- OMB in a 10/12 briefing suggested contractors needing help should refer to federal employee accommodations guidance
  - The government has issued accommodation request forms – quite rigorous
  - Has said additional questioning also may be warranted
  - Consider factors such as these:
    - the basis for the claim;
    - the nature of the employee’s job responsibilities;
    - the reasonably foreseeable effects on operations, including protecting other employees and the public from COVID-19
  - Such assessments will be fact- and context-dependent
  - Contractors are encouraged to consult their offices of general counsel with questions

# Reasonable Accommodations for Federal Employees

- Protocols for accommodated (unvaccinated) federal employees
  - Unvaccinated employees should follow applicable masking, distancing, testing, and travel protocols
  - Some circumstances may require heightened safety protocols
  - In some cases, the nature of the employee's job may mean no safety protocol other than vaccination is adequate
  - In such circumstances, the contractor may deny the requested accommodation
- Medical considerations
  - CDC recommends delaying vaccination in some circumstances
  - Employee should receive a first dose two weeks after clinical considerations no longer recommend delay
  - During delay, employees should follow applicable masking, distancing, testing and travel protocols



## Union Issues

- Unionized employees who are covered contractor employees must be vaccinated
- Unions will expect to bargain regarding implementation/“effects”
  - May mean working with union to sweeten the deal for their members, *e.g.*,
    - Paid time off to get vaccinated offsite
    - Incentive payments, drawings/lotteries
    - Terminated employees allowed to return if they get vaccinated later
  - May mean union is involved in discussions regarding accommodations
  - Unionized employees of large employers may insist on testing option and certainly will insist employers pay for testing if not required by OSHA to do so
  - Already see clashes/litigation with unions over vaccine mandates

# Managing Consequences for Noncompliance

- Task Force guidance is silent on this issue
- Employees should, however, expect consequences if they refuse to comply
- Some employers may follow their progressive discipline policies to try to give employees a chance to comply
- Because of the labor shortage, some are considering docking pay or bonuses instead of terminating (check bonus plan)
- Some employers are terminating workers; others are opting for unpaid leave
- Generally cannot terminate employees who are not vaccinated for a protected reason
- In that case, unpaid leave is probably a last-resort “accommodation”
  - Might be viewed as appropriate for a short-term issue
  - Otherwise, should try to find an accommodation that allows the employee to work.



## Evolution/Impact of Litigation

- Bloomberg Law reports that, as of 10/13, 39 federal cases were filed this year contesting vaccination requirements imposed by employers or governments; 85% of them were filed after August 1.
- First round of lawsuits (early this year) argued that, because of their emergency authorization status, the vaccines cannot be mandated.
  - Texas federal judge rejected this argument in lawsuit brought against Houston Methodist Hospital
- A number of courts have sided with hospitals and universities (e.g., Cincinnati Children's Hospital, Indiana University) in upholding vaccine mandates, but cases continue to be filed (e.g., University System of Maryland).
- Recent cases focus on denial of medical and religious exemptions.
- The New Civil Liberties Alliance is involved in representing plaintiffs in a number of vaccine mandate cases.
- Cases will continue to be filed and have an impact on decision-making.

# Anticipated Litigation Following Issuance of OSHA ETS

## Procedure

- Challenges to OSHA must be filed in courts of appeal as a petition for review.
- Likely to be filed in circuit courts around the country.

## Potential Plaintiffs

- Several governors have pledged to challenge the ETS
- Group of state attorneys general sent letter to President Biden setting forth legal arguments against the ETS
- Private litigants

# Anticipated Litigation Following Issuance of OSHA ETS

## Potential Arguments

- Whether ETS is truly “necessary” to protect workers from a “grave danger,” which is required to avoid notice/comment requirement
  - Need to reconcile the test-out option with necessity to protect from “grave danger”
- Whether the ETS is within the scope of OSHA’s authority
  - Is requiring mass vaccination beyond the scope?
  - Can OSHA require paid leave in light of other laws that govern?
- Whether OSHA’s rule preempts state restrictions on workplace vaccine mandates (Montana, Texas – so far).

# Questions?

For questions, please contact the presenters:



*Partner*

Phone: 303.298.5944  
Email: JBrown@gibsondunn.com



*Partner*

Phone: 212.351.3848  
Email: LElliott@gibsondunn.com



*Vice President and  
Assistant General Counsel,  
Keysight Technologies*

Email: jodi\_juskie@keysight.com

# Our Offices

## Beijing

Unit 1301, Tower 1  
China Central Place  
No. 81 Jianguo Road  
Chaoyang District  
Beijing 100025, P.R.C.  
+86 10 6502 8500

## Brussels

Avenue Louise 480  
1050 Brussels  
Belgium  
+32 (0)2 554 70 00

## Century City

2029 Century Park East  
Los Angeles, CA 90067-3026  
+1 310.552.8500

## Dallas

2001 Ross Ave, Suite 2100  
Dallas, TX 75201-6912  
+1 214.698.3100

## Denver

1801 California Street  
Denver, CO 80202-2642  
+1 303.298.5700

## Dubai

Building 5, Level 4  
Dubai International Finance Centre  
P.O. Box 506654  
Dubai, United Arab Emirates  
+971 (0)4 318 4600

## Frankfurt

TaunusTurm  
Taunustor 1  
60310 Frankfurt  
Germany  
+49 69 247 411 500

## Hong Kong

32/F Gloucester Tower, The Landmark  
15 Queen's Road Central  
Hong Kong  
+852 2214 3700

## Houston

811 Main Street  
Houston, TX 77002  
+1 346.718.6600

## London

Telephone House  
2-4 Temple Avenue  
London EC4Y 0HB  
England  
+44 (0) 20 7071 4000

## Los Angeles

333 South Grand Avenue  
Los Angeles, CA 90071-3197  
+1 213.229.7000

## Munich

Hofgarten Palais  
Marstallstrasse 11  
80539 Munich  
Germany  
+49 89 189 33-0

## New York

200 Park Avenue  
New York, NY 10166-0193  
+1 212.351.4000

## Orange County

3161 Michelson Drive  
Irvine, CA 92612-4412  
+1 949.451.3800

## Palo Alto

1881 Page Mill Road  
Palo Alto, CA 94304-1125  
+1 650.849.5300

## Paris

16, avenue Matignon  
75008 Paris  
France  
+33 (0)1 56 43 13 00

## San Francisco

555 Mission Street  
San Francisco, CA 94105-0921  
+1 415.393.8200

## São Paulo

Rua Funchal, 418, 35º andar  
Sao Paulo 04551-060  
Brazil  
+55 (11)3521.7160

## Singapore

One Raffles Quay  
Level #37-01, North Tower  
Singapore 048583  
+65.6507.3600

## Washington, D.C.

1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5306  
+1 202.955.8500