Debunking myths about OSHA's vaccine mandate

While the fate of the federal government's OSHA mandate remains in question as it sits in the 6th Circuit Court, employers are left wondering what to do next. Separately, OSHA has asked the 6th Circuit to dissolve the 5th Circuit's permanent stay, so employers can begin their compliance efforts. It should be noted that OSHA filed its motion before the latest Omicron variant of the coronavirus was reported.

While we're waiting for the judges of the 6th Circuit to decide both motions, let's bust some myths surrounding the mandate.

Myth #1: The mandate would apply to all employers regardless of size

Busted. OSHA's mandate would apply to employers with 100 or more employees. State mandates, on the other hand, may have lower employee thresholds.

Trap: If you drop below 100 employees, you'd still be covered under OSHA's mandate.

Permit us a tax analogy: If three different companies are under common control—they're under the same ownership—you must combine all employees from all the companies to determine whether you meet the 100+ employee mark. The same is true if you have employees working at different offices. If, say, you have 90 employees in New Jersey and 45 in Texas, you have 135 employees; you're a covered employer.

A major concern of nonprofit employers is whether you have to count volunteers when counting employees. No, you don't.

Myth #2: If you have 100 or more employees, then all employees must either get shots or get tested

Busted. OSHA's mandate gives employers some flexibility regarding employees who fall under the vax-or-test rules. You can, for example, mandate employees who work in the office get shots or get tested, while leaving out employees who work 100% remotely.

Similarly, employees who work outdoors can be excluded from the vax-or-test routine. All of those employees, however, need to be counted to determine whether you're a covered employer.

Myth #3: Employees who aren't vaxxed can't present the results of home tests

Busted. Employees can use home tests; they just can't use them at home. Employees can't administer and read their own tests, unless you or an authorized telehealth proctor observe them.

Examples of acceptable tests include tests processed by labs (including tests employees take at home), proctored over-the-counter tests, point-of-care tests, and tests where specimen collection and processing are

either done or observed by you. Further, employees can be required to pick up the cost of testing.

The mandate doesn't address whether you can select a test and where employees should go to get tested.

Myth #4: Employees who get tested instead of vaccinated need to be paid for this time

We'll half-bust this one. The mandate requires employers to give employees up to four hours off with pay to get vaccinated; it says nothing about time off to be tested.

On the other hand, the Department of Labor issued [FAQs](#) a while ago, the upshot of which is that nonexempt employees who work in public-facing jobs may need to be paid if they're tested before their workdays begin or on a nonwork day.

All non-exempt employees would need to be paid if they were tested during the workday. Exempts wouldn't need to be paid if they were tested before their workdays or on a non-working day, because they're paid their full salary in any week in which they do any work.

Myth #5: Employers must provide paid leave to employees who are quarantined

Busted. The paid-leave requirements in the Families First Coronavirus Response Act were voluntary for employees this year and expired at the end of September, anyway. However, some states may require you to pay employees who are quarantined.