

## LOS ANGELES BUSINESS JOURNAL



# PICKING UP THE PIECES

## BUSINESS IN THE AFTERMATH OF COVID-19

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### EMPLOYMENT LAW UPDATE:

## Mandatory COVID-19 Vaccine Policies and OSHA Mandates Regarding a Safe Workplace

By DANA KRAVETZ

**A**s pandemic fears wane and with coronavirus case rates on the decline by virtue of more and more Americans getting COVID-19 vaccines, an increasing number of businesses are turning the lights back on and reintegrating their workforces.

This is great news, though many employers are steering toward “business as usual” without a roadmap for lawfully compliant reintegration. Some in management are also uncertain as to whether they can, or should, require employees to be inoculated against the novel coronavirus. These topics are addressed here, beginning with the latter.

### CAN EMPLOYERS IMPOSE MANDATORY COVID-19 VACCINATION POLICIES?

The short answer is yes, employers can legally require their workers to be injected with the COVID-19 vaccine. That being said, whether a mandatory vaccine policy should be imposed is another question altogether.

As a matter of law, mandatory vaccinations are permissible, and that is not a new concept. For instance, plenty of workplaces, like hospitals, have mandated flu shots for decades.

Bottom line: private employers have an inherent duty to protect their employees, so says the Occupational Safety and Health Administration. OSHA’s General Duty Clause compels every employer to provide workers a place of employment free from recognized hazards likely to cause death or serious physical harm.

Without question, the novel coronavirus qualifies as a dangerous — potentially even fatal — hazard, and therefore, its spread must be contained. Toward that end, mandatory vaccines, wearing PPE on the job, and continued testing appear to be the best, if not only, ways forward.

### OBSTACLES TO REQUIRING COVID-19 VACCINES

An employer’s legal imposition of a COVID-19 vaccine requirement is not without limits.

Employees can leverage the American With Disabilities Act to avoid immunization to the extent it prohibits discrimination against individuals with disabilities. No doubt, some workers are bound to claim to have infirmities that preclude them from getting inoculated, even if mandatory. And if they do, the ADA calls for individualized assessments to determine if these unvaccinated employees would pose a direct threat to the workplace. In the face of such a threat, employers must establish whether a reasonable accommodation could be provided to reduce the risk

without causing undue hardship.

It is important to understand that if a direct threat cannot be mitigated by way of a reasonable accommodation, the unvaccinated employee can be barred from physically entering the workplace — the ADA notwithstanding. However, a disabled (and unwilling) worker cannot be automatically terminated.

Title VII of the Civil Rights Act provides another basis upon which employees can seek to avoid a COVID-19 vaccination requirement. According to the law, reasonable accommodations must be made for employees whose sincerely held religious beliefs, practices or observances prevent them from being vaccinated. If no reasonable accommodation — absent undue hardship — is possible, then (as above) it would be lawful for these unvaccinated workers to be kept from the workplace, but their refusal to get immunized would not be grounds for automatic termination.

To be sure, a mandatory vaccine policy, while legal, presents a difficult decision for any employer, and the imposition of a vaccine requirement could be asking for trouble. Litigation — premised upon the ADA, Title VII or otherwise — is likely to be filed by aggrieved workers who either do not want to be vaccinated or experience adverse reactions to their injections. Added to that is the impact that a vaccine mandate could have upon employee relations given ever-growing political and cultural divisions among our populace. Taken together, it would be wise for employers to think long and hard before making COVID-19 vaccines a condition of employment.

### OSHA AND WORKPLACE SAFETY

Employees will want to know and feel that their places of business are completely safe in the aftermath of COVID-19. As such, workplace safety should be everyone’s priority.

OSHA, employees and unions will surely characterize the aforementioned General Duty Clause as just that, a duty. Of course, the standard of what is appropriate to maintain a safe environment for employees will differ by industry, and the size of an employer and the nature of the work performed by its employees will be key factors. In any event, every employer should engage in a top-down review to determine how, and if, it can make its workplace safer as business returns to normal.

Toward that end, OSHA has made recommendations consistent with what is now common practice in workplaces nationwide. They call on employers to implement COVID-19 protocols that incorporate all of the following elements:

- Assignment of a coordinator to oversee COVID-19

policies and mitigation efforts.

- A system for communicating COVID-19 policies and procedures.
  - Identification and correction of COVID-19 hazards.
  - Implementation of measures — PPE usage, social distancing and frequent handwashing — to limit the spread of COVID-19.
  - Assurance that infected workers are separated and sent home from the workplace.
  - A policy instructing exposed workers to stay home and quarantine.
  - Protections for higher risk associates by way of policies that allow them to work from home or from workstations located in less dense, better ventilated areas.
  - Implementation of engineering and administrative controls related to COVID-19.
    - The provision of paid leave or salary continuation.
    - Enhanced cleaning and disinfection protocols.
    - Guidance regarding screening and COVID-19 testing.
    - Policies that protect workers from retaliation for voicing concerns about an employer’s lack of COVID-19 infection control.
  - Provision of no cost COVID-19 vaccines.
  - Assurance that even vaccinated employees will adhere to PPE and social distancing requirements until medical evidence suggests that such measures are no longer necessary.
  - A system of COVID-19 reporting and recordkeeping.
  - Detailed return to work criteria.
  - Management and employee training regarding COVID-19 policies and procedures (in appropriate languages assuming a multi-lingual workplace). Note that while execution of pandemic-related policies is critical, sufficient management training so that all COVID-19 protocols are understood and sufficiently implemented is equally important.
- Adherence to all other applicable and enforceable OSHA standards, including those that pertain to respiratory protection, sanitation and medical records.

By abiding by this guidance, employers will go a long way toward providing their workers with the safe workplace they seek and that which is required by law.

Dana A. Kravetz specializes in a range of employment law matters — discrimination, wrongful termination, whistleblower and class action litigation, sexual harassment prevention, workforce reduction, hiring best practices and wage and hour issues, among them. He can be contacted at (310) 299-5500 or [dkravetz@mrlp.com](mailto:dkravetz@mrlp.com).



BUSINESS IN THE AFTERMATH OF COVID-19

In the wake of the COVID-19 pandemic, which has had an unprecedented impact on how businesses operate around the world and here in Los Angeles, companies have been left to navigate an uncertain path forward. Indeed, “business as usual” will continue to look much different in the months and years ahead as the economy works to brush off the stain — and strain — of the novel coronavirus.

In “Picking up the Pieces: Business in the Aftermath of COVID-19,” a virtual live presentation that took place on April 14th and was hosted by the Los Angeles Business Journal, the subject matter pros at Michelman & Robinson, LLP helped steer L.A. business leaders through discussions on a range of post-pandemic-related issues that are — or should be — flashing brightly on their respective radar screens.



### Sanford L. Michelman, Esq.

*Chairman, Michelman & Robinson, LLP; and Member of the Federal Reserve Bank of San Francisco's Board of Directors*

**H**aving handled countless, noteworthy class action cases and “bet the company” litigation matters considered the most challenging, Sanford Michelman has, over the years, become a formidable presence in courtrooms — and boardrooms — nationwide, representing companies in a range of industries, including those in the banking and finance, insurance, media and private equity spaces.

“When it comes to navigating the intersection of COVID-19, business, and law, the attorneys at Michelman & Robinson have been at the forefront since the novel coronavirus reached pandemic proportions. Clients here in Los Angeles and throughout the country have leaned on M&R for advice and counsel that’s informed by an in-depth understanding of the issues spawned by this hopefully once-in-a-lifetime crisis.”



### Dana A. Kravetz, Esq.

*Firm Managing Partner*

**D**ana A. Kravetz is a sought-after employment lawyer who represents some of the most admired companies in Los Angeles. As of late, many clients have relied upon his advice and counsel in connection with employment-related fallout due to COVID-19, including guidance concerning furloughs; separations; health and safety requirements (OSHA, etc.); workplace procedures, manuals, and employee training; telecommuting and electronic use policies; employee reintegration; and regulatory and municipal compliance.

“Employers throughout L.A. are walking into a minefield of unique operational and legal issues stemming from this horrible pandemic. It’s important that they do so with eyes wide open, and that includes an understanding of employee concerns, OSHA requirements, and the interplay between state and local mandates.”



### Mona Z. Hanna, Esq.

*Office Managing Partner Orange County*

**M**ona Z. Hanna is among the most preeminent trial lawyers nationwide. Chair of Michelman & Robinson’s Litigation Department, her record of courtroom victories is nothing less than remarkable. Mona routinely delivers innovative solutions in cases of first impression and in matters in which her clients face the potential for catastrophic exposure.

“COVID-19 will have a lasting effect in the months and years to come. For companies across Southern California, this impact will continue to materialize in the wake of pandemic-related government shutdowns, supply chain and production line interruptions, customer drop off, employee layoffs, and breached contracts, all of which are sure to wind up as the subject of litigation statewide.”



### Bryan Johnson, Esq.

*Partner*

**B**ryan Johnson oversees Michelman & Robinson’s standalone COVID-19 Practice Group made up of an interdisciplinary team of attorneys singularly focused on advising and counseling clients in connection with a broad spectrum of challenges resulting from the pandemic and what is sure to be its troubling aftermath.

“The Paycheck Protection Program provides a much-needed lifeline for so many businesses impacted by COVID-19—not just in Los Angeles, but nationwide. Still, the federal assistance is all for naught if stakeholders don’t fully appreciate the ins-and-outs of loan forgiveness.”



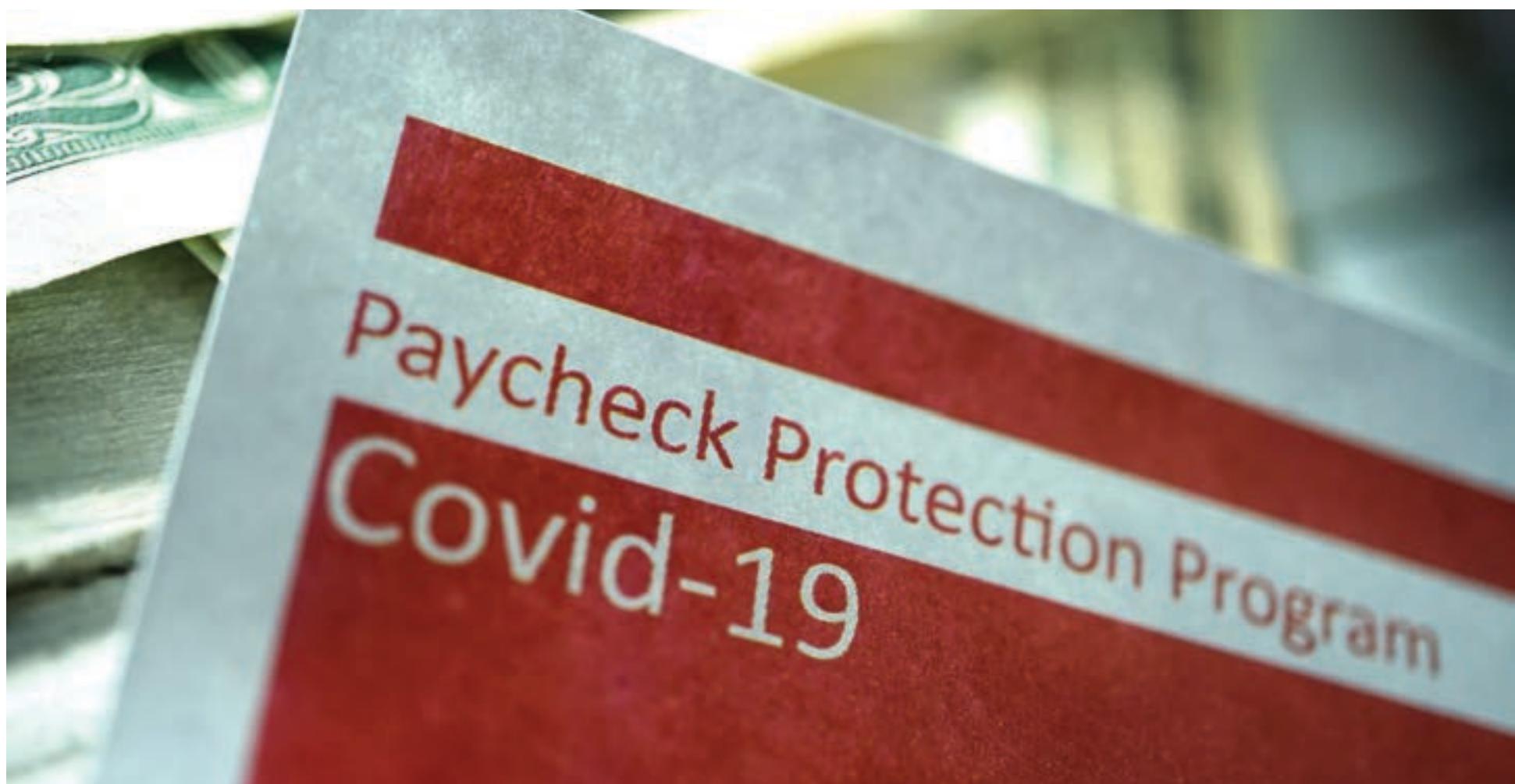
### Howard I. Camhi, Esq.

*Partner*

**A** bankruptcy law veteran, Howard I. Camhi represents an impressive roster of commercial clients in complex bankruptcy, corporate restructuring (both in and out of court), distressed asset, acquisition and disposition, and related litigation matters. As can be imagined, he has been particularly busy in the wake of COVID-19.

“The economic downturn triggered by the pandemic has more businesses than ever weighing bankruptcy and similar types of relief. That being said, while a Chapter 7 liquidation or Chapter 11 reorganization may be a reasonable choice for some, these vehicles are not the only option for companies limping away from the scourge COVID-19.”

To view highlights from the webinar, visit [labusinessjournal.com/mrlp](http://labusinessjournal.com/mrlp)



# The Nuts and Bolts of the PPP and Loan Forgiveness

By BRYAN JOHNSON

For many businesses, the Paycheck Protection Program has been a much-needed economic lifeline. For others, though, it has amounted to a source of frustration and uncertainty, especially when it comes to loan forgiveness. Bryan Johnson, who leads the standalone COVID-19 Practice Group at Michelman & Robinson, LLP, provides some background and explains how PPP loan forgiveness works.

Just over a year ago, when the novel coronavirus reached pandemic proportions, the CARES Act was passed by the U.S. Congress and signed into law. The massive \$2.2 trillion stimulus package was designed to counter the devastating economic consequences of the COVID-19 outbreak, and one of its most prominent elements was the Paycheck Protection Program.

The PPP was created in an attempt to help small businesses and other covered entities stay afloat, and to incentivize them to keep employees on their payrolls despite pandemic-related declines in business. This was accomplished by way of forgivable loans to cover an employer's payroll expenses, now for up to 24 weeks (originally the covered period for so-called "first draw" loans was just eight weeks).

At its core then, the PPP is a grant program, assuming borrowers use loan proceeds for allowable purposes (read: wages, salaries, mortgage interest, rent, utilities, and the like). And those that qualify — for instance, businesses and 501(c)(3) corporations with 500 or fewer employees and individuals who operate as sole proprietors or independent contractors — can receive first draw loans that are two and a half times their average monthly payroll up to \$10 million.

## THE PPP, TAKE TWO

A second iteration of the PPP became law last December, adding \$284 billion to the program. This allowed for additional first draw loans, as well as second draw loans for certain borrowers; namely, employers with less than 300 employees that have experienced a 25% decrease in gross receipts during any quarter of 2020 as compared to the same quarter in 2019. Pursuant to PPP 2.0, some additional entities also became eligible for loans; the list of forgiveness-worthy expenses was expanded; and amounts for second draw loans were adjusted to two and a half times a borrower's average monthly payroll up to \$2 million (three and a half times for restaurants and bars). Of note, the application deadline for all PPP loans was recently extended to May 31.

## PPP LOAN FORGIVENESS:

### THE FUNDAMENTALS

Assuming a borrower has used PPP funds for allowable purposes, its loan is eligible for forgiveness. That being said, in order to maximize forgiveness, that borrower must have spent no less than 60% of the PPP proceeds toward payroll and no more than 40% on non-payroll costs.

There is more. Borrowers must maintain employee headcount and wage levels to optimize loan forgiveness. Generally, a borrower can only expect partial forgiveness should headcount or wages not be returned to pre-pandemic levels by the end of the loan's covered period.

There are multiple PPP loan forgiveness application forms to choose from depending upon the circumstances of the borrower's business and loan amount at issue, the simplest being Form 3508S, which can be used by those that received first or second draw loans of \$150,000 or less. The good news about Form

3508S is that it does not require borrowers to show the calculations used to determine their loan forgiveness amount. Nonetheless, supporting documentation may be sought by the SBA during its loan review process.

Form 3508EZ is another mechanism for streamlined loan forgiveness, but it is only available if the borrower meets one or more of the following criteria:

- The borrower has not reduced the salaries or wages of employees making under \$100,000 annually by more than 25% during the covered period; and (2) the borrower did not reduce the number of employees or average paid hours between January 1, 2020 and the end of the covered period.

OR

- The borrower has not reduced the salaries or wages of employees making under \$100,000 annually by more than 25% during the covered period; and (2) the borrower was unable to operate during the covered period at the same level of business activity as before February 1, 2020 due to compliance with government regulations.

Borrowers that do not qualify to submit either Form 3508S or Form 3508EZ must complete the more cumbersome Form 3508. Those submitting Form 3508 will need to have at the ready evidence verifying eligible cash compensation and non-cash benefits paid, such as bank statements or payroll reports; payroll tax filings; documents evidencing employer contributions to employee health insurance and retirement plans; and verification of eligible non-payroll costs, including non-payroll obligations that existed prior to February 15, 2020.

No matter the form used, first and second

round PPP borrowers that receive loan forgiveness may claim federal tax deductions for the covered expenses funded by their loan proceeds. Yet another positive of the PPP.

## POST-FORGIVENESS ISSUES

Without question, loan forgiveness is more closely scrutinized than front-end PPP loan eligibility. But the scrutiny does not end there.

Companies that secure PPP loans for \$2 million or more should expect SBA auditors to come knocking. In fact, the SBA and U.S. Treasury Department have explicitly stated that all PPP loans in excess of \$2 million will be reviewed following a lender's submission of a borrower's loan forgiveness application.

For those that have received south of \$2 million in PPP proceeds, now is not the time to be breathing a sigh of relief. They too may be in line for audit as well given an Interim Final Rule released by Treasury stating, "[f]or a PPP loan of any size, SBA may undertake a review at any time in [its] discretion."

Borrowers can prepare for audit by (1) identifying a point person through whom all PPP-related information will flow; (2) coordinating with professional service providers for full strategic alignment; (3) setting aside all documentation regarding PPP eligibility and certification, the use of loan proceeds, and qualification for forgiveness; and (4) developing a strategy for responding to or explaining away any possible negative evidence.

Bryan Johnson is a powerhouse litigator who has also forged a particular expertise handling matters arising out of COVID-19, including PPP compliance and loan forgiveness. He can be contacted at [bjohnson@mrlp.com](mailto:bjohnson@mrlp.com) or by phone at (312) 706-7762.



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