

# Senza Sordino

Official Publication of the International Conference of Symphony and Opera Musicians

VOLUME 59 NO. 1

MARCH 2021

## No Economic Recovery Without an Arts Recovery

By Keith Carrick

*This article originally appeared in the Salt Lake Tribune, and is reprinted here by permission.*

The recent decision by Salt Lake County to temporarily close its performing arts venues came as a tough blow to the arts industry.

Though it was an expected and necessary step in an attempt to slow the pandemic, Christmas won't be the same without live music, dance, and theater and the sense of celebration, reflection, and joy that they bring—things that our community so desperately needs right now.



The pandemic continues to be a grueling experience for so many of our businesses that depend on the revenue they would receive during the Christmas season. Our performing arts institutions are certainly no different. All depend on holiday ticket sales; some make the majority of their earned income for the entire year during the holidays.

At some point in the future, it will be necessary to enact an economic recovery plan, and there can be no economic recovery without an arts recovery.

Americans for the Arts reports that in 2019, the arts industry had a \$6.2 billion economic impact in our state, making up 4.2% of Utah's gross domestic product. (By comparison, the mining industry contributed \$3 billion, or 2% of GDP.)

Our performing arts institutions are an integral part of the economic ecosystem, having a \$300 million annual economic impact in Salt Lake City alone, and supporting 40,000 jobs statewide (26,000 of which are in Salt Lake County). The crowds that patronize performing arts venues also spend money at area bars, restaurants, businesses, parking lots, hotels and more, all of which cannot fully recover without the arts.

Just as it is important to support our local restaurants and cafes by getting takeout, and local small businesses by order-

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## Immunizing Our Orchestras: Vaccine Mandates and the Law

By Kevin Case

2020, our *annus horribilis*, actually ended with some good news: coronavirus vaccines have been approved, appear to be safe and effective, and are being



MAURA KIRKMAN

distributed. A burning question among employees everywhere, including musicians, is whether their employers can mandate vaccination as a condition of coming to work. News articles have been published answering that question in

the affirmative. The general response has been some variation of "wait, what?"

It is true: employers generally have the ability to require vaccinations. But there are a number of nuances. First and foremost, because ICSOM orchestras are unionized, the threshold question is whether employers are obligated to bargain

before implementing policies like mandatory vaccinations. That is key, because if bargaining is required, the question of whether to require vaccinations will be firmly in the hands of our orchestra committees and AFM Locals. But if the employer is not required to bargain, or if the parties do bargain an agreement for a mandatory vaccination policy, then rules applicable to employers generally will apply; and at that point, things get more complicated.

### I. To bargain or not to bargain?

In unionized workplaces, an employer cannot unilaterally implement rules or procedures that implicate mandatory subjects of bargaining, absent a waiver by the union (more on that in a minute). It is well settled that health and safety rules are a mandatory subject of bargaining—as are most rules that could result in termination of an employee. Given that mandatory vaccinations would be both a health and safety rule and one that could lead to termination if an employee were to refuse, there should be no question that this is a mandatory subject of bargaining.

The question then turns on whether the union has waived

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## Chairperson's Report

By Meredith Snow

### Forward Motion

As we come to the close of the first month of the Biden administration, tangible change is already evident. The desperately needed \$1.9 trillion American Rescue Plan is underway and Biden has quickly made good on his vow to be a "pro-union" president. Within hours of taking office he fired Peter Robb, general counsel of the National Labor Relations Board (NLRB) and friend to managements everywhere. Biden immediately signed executive orders undoing swaths of the destruction left behind by the Trump administration. He has made COVID vaccines and federal assistance for the pandemic a priority. The landscape is rapidly changing.

So rapidly in fact, that we had to quickly mobilize to advocate for our AFM multi-employer pension. As Representative Richard Neal (D-MA), Chairman of the House Ways and Means Committee, introduced the Emergency Pension Plan Relief Act of 2021 (EPPRA), ICSOM immediately launched another Phone2Action (P2A) email campaign in support of EPPRA, as its inclusion in Biden's COVID relief package started to become a reality. The ICSOM campaign generated almost 1800 letters to legislators and 45% of those respondents were new advocates to ICSOM.

The Player Conferences Council (John Michael Smith, ROPA; Marc Sazer, RMA; Anthony D'Amico, TMA; minus Robert Fraser, President of OCSM, as Canada has its own pension plan) sprang into action along with AFM organizers Michael Manley and Alex Tindal Wiesendanger, Communications Director Antoinette Follett, and AFM Legislative-Political Director Alfonso Pollard. Adding to the email campaign already disseminated by President Ray Hair, we formulated a "Zoom-banking" operation—asking volunteer musicians to phone constituent musicians in the targeted districts of the House Ways & Means Committee, to encourage them to ask their Representatives to vote in favor of what has come to be called the Butch Lewis/EPPRA-21 Act. Over three days, eighty-five volunteers (on Zoom together) generated 1000 calls to constituent musicians asking them to call their Representatives on House Ways & Means. As of this writing, Butch Lewis/EPPRA-21 is included in the reconciliation bill, and should reach the Senate by early March. The Biden administration is racing the clock to beat the mid-March expiration of the enhanced unemployment benefits.

Our next phase of the campaign will be to target Senators. In addition to another round of "Zoom-banking", we are teaming up with AFM Local Presidents and musicians from all our Player Conferences to schedule Zoom meetings with their Senators and ask them to support Butch Lewis/EPPRA in Biden's Rescue Plan. Rep. Neal said in a statement, "I'm committed to getting a solution to this (pension) crisis signed into law as quickly as possible." ICSOM and the AFM >>



Diana Alencastro/Edinburgh.com



INTERNATIONAL CONFERENCE OF  
SYMPHONY AND OPERA MUSICIANS

#### Orchestras

Alabama Symphony Orchestra  
Atlanta Symphony Orchestra  
Baltimore Symphony Orchestra  
Boston Symphony Orchestra  
Buffalo Philharmonic Orchestra  
Charlotte Symphony Orchestra  
Chicago Lyric Opera Orchestra  
Chicago Symphony Orchestra  
Cincinnati Symphony Orchestra  
The Cleveland Orchestra  
Colorado Symphony Orchestra  
Columbus Symphony Orchestra  
Dallas Symphony Orchestra  
Detroit Symphony Orchestra  
The Florida Orchestra  
Fort Worth Symphony Orchestra  
Grand Rapids Symphony  
Grant Park Orchestra  
Hawaii Symphony Orchestra  
Houston Symphony  
Indianapolis Symphony Orchestra  
Jacksonville Symphony  
Kansas City Symphony  
Kennedy Center Opera House Orchestra  
Los Angeles Philharmonic  
Louisville Orchestra  
Metropolitan Opera Orchestra  
Milwaukee Symphony Orchestra  
Minnesota Orchestra  
Nashville Symphony  
National Symphony Orchestra  
New Jersey Symphony Orchestra  
New York City Ballet Orchestra  
New York City Opera Orchestra  
New York Philharmonic  
North Carolina Symphony  
Oregon Symphony  
Orquesta Sinfónica de Puerto Rico  
The Philadelphia Orchestra  
Phoenix Symphony  
Pittsburgh Symphony Orchestra  
Rochester Philharmonic Orchestra  
St. Louis Symphony  
The Saint Paul Chamber Orchestra  
San Antonio Symphony  
San Diego Symphony Orchestra  
San Francisco Ballet Orchestra  
San Francisco Opera Orchestra  
San Francisco Symphony  
Symphoria  
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**Subscriptions:** \$10 per year, payable to Senza Sordino, c/o Michael Moore, Treasurer, 953 Rosedale Road NE, Atlanta, GA 30306. Report delivery-related problems to Peter de Boor, Editor, 431 N Kenmore St, Arlington, VA 22201.

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will do everything we can to help him realize that ambition.

## NAAS Guidelines

After many months of discussions, the National Alliance for Audition Support (<https://www.sphinxmusic.org/national-alliance-for-audition-support/>) has released the *NAAS Recommended Audition and Tenure Guidelines*. A committee of 15 members (orchestra administrators, AFM representatives, AFM musicians, music directors, and personnel managers) crafted these suggested guidelines—all subject to collective bargaining—with the objective of increasing diversity through our audition process. My hope, and that of the other committee members, is that these suggestions will spur examination and discussion of our current audition procedures. There is no “one size fits all” archetype for audition procedures just as there is no single business model for our orchestras. With a mutual understanding that there is both a need and a desire to attain greater diversity and inclusion at *all* levels of our orchestral associations—board, management, music director, musician, donors, patrons, and guest artists—it is hoped that these suggested guidelines will move us closer to the goal of equal representation onstage.

It is important to keep in mind that these recommended guidelines were crafted, not solely for ICSOM orchestras, but for the 100 NAAS partner orchestras of every budget size. These, in brief, are the recommendations:

1) *Consider granting all applicants a live audition—no screening of resumes.*

Budget and time constraints may make this impossible to implement, but what creative solutions might be available to us? Split prelim committees, taped submissions, redacted paper resumes all come to mind.

2) *Recruit applicants of color and (4) in cases of automatic advancement or invitation to later rounds try to include a percentage (25%) of Black and Brown musicians into those rounds.*

Since many orchestras already invite candidates to later rounds for a variety of reasons, this would mean examining the criteria we use to determine which musicians get invited or advanced.

3) *Fully screened auditions from first through last rounds.*

In 2018 ICSOM passed a resolution encouraging all orchestras to adopt an audition process that retains screens throughout every individual round of auditions.

5) *“No hire” auditions are an expense and frustration to all parties. Strongly encourage that a decision will be made to hire by the end of that audition process.*

This is a more subjective ask—location, turnout, and timing of the audition will all influence what is possible. Additionally, in some groups, a practice has developed (intentionally or unintentionally) of holding multiple no-hire auditions until the absolute perfect candidate is found. Beginning the auditions process with the consensus and intention of making a decision to hire may be desirable.

6) *Consider if the use of “trial weeks” inappropriately places candidates in the untenable position of having to “fit in” and meet unknown expectations. Information gleaned during trial weeks could be obtained through the audition process or during the probationary period.*

The use of trial weeks has burgeoned in recent years. It is worth examining the criteria used for implementation in addition to the effectiveness of outcomes.

7) *In addition to musical excellence, a musician’s ability to serve as a cultural ambassador or spokesperson may be of value to orchestras. Where an orchestra’s bargaining partners (musicians/union and management) agree that such additional skills are desirable in new musician hires, the parties will need to develop and agree upon ways of evaluating applicants in addition to the blind audition. A consultant with expertise in equity and diversity may be helpful to the bargaining parties in developing specific methods and processes for extra-musical evaluation, as may the involvement of diverse musicians and community leaders.*

This is both an ideological and practical discussion that puts into question the very heart of our job definition. While we have expanded our duties in recent years to include extra-musical activities, they have been voluntarily undertaken and are not part of the decision-making process in hiring. There may be orchestras who would want to explore this concept—again, these are suggested guidelines for discussion and exploration. They are not directives, nor are they aimed solely at ICSOM orchestras. The answer for some may simply be “no”.

The tenure review guidelines are only four in number, all of which are suggestions to facilitate a clear and transparent process of constructive feedback for the tenure candidate in the interest of assisting a positive outcome for everyone.

After this past year’s revelations of the racial inequities that exist in our society, I hope we are ready to begin the discussion of how those inequities may manifest within our own orchestras. These guidelines are intended to be a starting point for exploring how our audition processes might help to promote the inclusion and equity that we both need and desire on our stages. 

*Note: The complete guidelines are available at <https://www.dropbox.com/s/unxr0o4f4orsnir/NAAS%20Recommended%20Audition%20and%20Tenure%20Guidelines%20v.%202001.15.21.pdf>.*

## President’s Report

By Paul Austin

### March

It was one year ago this month that our world changed drastically. Many ICSOM musicians were in the midst of rehearsing for upcoming performances when they were instructed to pack up all belongings, go home, and



TERRY ANDERSON

await further instructions. In the weeks that followed, daily schedules were upended. Survival mode kicked in, and many examined the usual steps of their normal routines for revised ways to live safely without possible exposure to COVID-19. Masks were worn and glasses were fogged. We adapted to seeing colleagues and loved ones via Zoom calls. And sadly, we experienced loss. >>

The most devastating part of the pandemic has been the loss of lives. While the loss of a beloved relative or an esteemed colleague is hard in the best of times, these losses have been even more acutely felt in this time when we have lost so much else—postponed weddings, graduations, contact with others outside our households, and playing music on stage or in the pit with our colleagues. Last fall ICSOM created an "In Memoriam" page on our website to honor and remember our musicians who have passed. (Note: see <https://www.icsom.org/in-memoriam/>)

And yet through this tragedy we must have hope. While human beings need basic tangible elements in order to survive, civilization cannot thrive without the intrinsic value that the arts provide. As society continues to make progress in taming this pandemic, inspiring performances from our orchestras and opera and ballet companies will play crucial roles in the next step for moving forward.

Most of us have been fervently seeking some action to take in the face of society's pandemic paralysis. For some, this has involved socially distanced porch concerts, or playing remotely for hospital patients. For others it has meant pursuing other vocations while they wait for orchestral music to resume. The opera world responded to the pandemic in several ways that were unique to the profession. Some ICSOM opera companies shifted from making costumes to creating and marketing COVID masks—the San Francisco Opera Orchestra musicians have designed masks as well, and are selling them on their website. In Europe, opera singers have been called upon to provide exercises for rehabilitating those who face difficulties in breathing.

As the pandemic grinds on, we need to ready ourselves for what lies ahead. And exactly how do we move forward? The name of this month, which also describes an activity of forward motion, could provide an answer. Recalling my nine years of marching band reminded me that we must move as a group and not as individuals.

My first year of marching band was on the bass drum. The heartbeat of the group, I provided the steady pulse that the entire group relied upon to ground itself as a unit. The following years I played the horn, providing melodic support for a more harmonious ensemble. My final year was as a college drum major. As the leader of the band, I aimed to provide solid guidance while also listening and responding accordingly.

Can any of this be applied to arts organizations? I believe so. From the ground up, all groups need cohesion, team players, and inspiring leaders.

We can look to the tremendous work by the musicians of the Pittsburgh Symphony Orchestra as an example of marching in-step together. Five years ago, the PSO Musicians began the Body & Soul partnership as volunteers for 412 Food Rescue, a local non-profit organization. The PSO Musicians take part by unloading food trucks and performing pop-up concerts. (Note: see "Feeding Pittsburgh's Body and Soul" in the October 2018 issue)

Of course, all professional orchestras experience cohesion regularly. But the nature of this project—coming together outside of Heinz Hall for the food-insecure populations of their community—has brought that cohesion to a new level.

Whenever we think of a team player, we imagine someone willing to take on the task at hand without complaint. When the majority of a group is participating, you know that there are many team players among them. The PSO Musicians proudly report that they have 100% musician participation in Body & Soul.

Lorien Benet Hart clearly is the inspiring leader behind this project. As shown in her article, "Feeding Pittsburgh's Body and Soul", her initiative in finding their partner 412 Food Rescue and organizing her colleagues was the spark that brought this partnership to life.

Today the PSO Musicians are joined by Pittsburgh Symphony staff and board members in this volunteer project, a worthy effort that is recognized by the community. ICSOM's annual conference is scheduled to be held in Pittsburgh this summer, and I hope that attendees can witness and participate in this fine activity.

American billionaire and philanthropist David Rubenstein, who is chairman of the Kennedy Center for the Performing Arts, stated that, "The world is a complicated place, and there's a lot of division between people. The performing arts tend to unify people in a way nothing else does."

A tall order, for sure. But our training, and the experience we have accumulated on the way to attaining our current positions in ICSOM orchestras have made us determined and strong. Using our abilities together seems to be the most logical answer.

Now, march.



## AFM Washington Legislative Agenda

By Alfonso Pollard

After a period of uncertainty in the nation's capital, the new Biden administration along with a new 117th Congress have now been sworn in. This signals a new direction for the country and a new hope for passage of



organized labor's agenda. With the House in the hands of labor-friendly Members, and the evenly-divided Senate operating under a labor-friendly Vice President who serves as a legislative tie-breaker, unions across the board now expect to move forward with their congressional priorities, and that includes the American Federation of Musicians.

Following is an outline of AFM legislative priorities in the coming year that require us all to weigh in and have our voices heard. The AFM Player Conferences in cooperation with AFM President's Ray Hair's office and the IEB look forward to your help getting our issues across the congressional goal line. As workers, we are in an advantageous position at this moment in time, and your union will be asking you to help contact your legislators both in your respective congressional districts and in Washington DC. Over the past six months, organized labor has created and presented transition documents for the new transition team that offered detailed solutions in tune with labor's legislative priorities. Now that a new government is in place, we look forward to having you participate in your >>

union's legislative activities, so please be prepared to engage multiple times.

### **Pension Legislation** (Helping to guarantee retirement security)

Right out of the gate, congressional chairs of both the House Ways and Means and the Education and Workforce Committees have introduced new pension legislation containing language crafted and supported by labor affiliates over the years. An unprecedented internal union coalition has come together among our ICSOM, ROPA, Recording, Theater, and freelance player conferences to systematically build internal union advocacy designed to more effectively influence our elected officials to vote in support of pending pension legislation. As the congress moves through the budget reconciliation process, this coalition has reached out to more AFM player conference members than ever to encourage your participation in the pension legislative process. In addition to a recent advocacy blast email on pension legislation from President Hair, many of you will hear from player conference leaders and Local officers asking for your help.

### **The PRO Act**

Organizing workers is the life's blood of any labor union. The Protecting the Right to Organize Act has been reintroduced in the new 117th Congress. The PRO Act expands various labor protections related to employees' rights to organize and collectively bargain in the workplace. The bill passed the House during the 116th Congress and was sent to the Senate Republican leader's desk but it saw no action. The bill is expected to be given favorable debate in both the House and the Senate with a good chance of passing both chambers and being signed by the White House. It's important that we keep our eye on the prize. Additional labor friendly legislation that will benefit our workers and our union will be prominently introduced in this Congress. Please stay tuned to hear from your union about legislative and political campaigns that will help us be successful.

### **The AM-FM (Ask Musicians For Music) Act**

(Performance rights legislation—more money in your pocket and greater protection for your creative content)

This piece of important copyright legislation will come up again during the 117th Congress. As you may know, passage of this legislation would establish a new income stream for those whose creative content is currently performed on AM and FM radio without compensation from broadcasters. This has been an ongoing fight over the years that has moved the AFM on several occasions to craft and introduce favorable legislation. Likewise, the National Association of Broadcasters has, each congress, introduced their non-binding Local Radio Freedom Act (LRFA) resolution designed to encourage legislators in Washington to avoid giving musicians the rights and remuneration we deserve for our creative content while making billions in advertising dollars each year. In cooperation with the Music First Coalition, we imagine a light at the end of this tunnel under a pro-worker, pro-intellectual property Biden administration that will push the AM-FM Act across the finish line. Please stay prepared.

### **The National Endowment for the Arts and the Corporation for Public Broadcasting** (Federal funding for the arts)

These institutions remain at the top of the AFM legislative office's agenda as many of our members and the organizations they work for depend on federal subsidies to support their activities. We work each year with Americans for the Arts, the League of American Orchestras and myriad other national organizations to not only pass the appropriation but to increase funding levels. Constantly threatened by ultra conservative administrations to be zeroed out of the budget, we are thankful for an effective bipartisan congressional arts caucus that over the years keep these agencies alive. 

*Note: the author is the Legislative-Political Director for the American Federation of Musicians.*

## **2021 COVID-19 Legislative Relief: An Overview**

*By Heather Noonan*

**E**ven as Congress and the White House rapidly undertake work on the next COVID-19 federal relief package, provisions signed into law at the end of 2020 are still being unpacked as the fine print on implementation emerges. The Consolidated Appropriations Act was enacted on December 27, 2020 and makes more than \$900 billion in new COVID-19 resources available.

Federal agencies are responsible for interpreting and implementing key relief provisions, and full guidance is still emerging. The League of American Orchestras has been tracking developments and is posting updated information and direct links to federal guidance in its full 2021 COVID-19 Relief Summary (*Note: see <https://americanorchestras.org/learn/covid-19/federal-assistance/>*). Here are some highlights.



Ken Williams

### **Shuttered Venue Operators Grant (aka Save Our Stages)**

The Small Business Administration will implement a new \$15 billion grant program to support "shuttered venue operators." Orchestras may qualify to apply, even if they do not own their performance space. All applicants must choose whether to pursue a Paycheck Protection Program (PPP) forgivable loan or a Shuttered Venue Operators Grant (SVOG) in 2021. Submitting an application for the PPP program in 2021 will disqualify an organization for SVOG eligibility.

SVOG applicants must demonstrate a minimum 25% decline in gross earned revenue in one calendar quarter of 2020, compared to the same quarter in 2019, to qualify to apply. The maximum grant amount is based on 45% of an entity's gross earned revenue in 2019, with a maximum award of \$10 million. Allowable expenses include payroll, including payments to independent contractors; rent; fixed costs like mortgage and debt payments; as well as maintenance expenses, >>

administrative costs, and other expenses.

The program will include two priority application periods, once the application process is open. In the first 14 days, SBA will issue grants to applicants that demonstrate a revenue decline of 90% or more from April 1 to December 31, 2020, compared to the same time period in 2019. The second 14 days will be limited to those with a revenue decline of 70% or more. The SBA web guidance only specifies “revenue,” without clarifying whether the required 90% and 70% declines will apply to “gross earned revenue” or total revenue. This distinction is important to clarify before nonprofits determine whether they may have access to the priority period, due to ongoing contributed revenue received throughout the pandemic. The SBA intends to provide more details to confirm these definitions.

It is unclear how quickly the \$15 billion in SVOG funding may be exhausted either in the priority periods or throughout the full administration of the program, as eligibility is open to a range of nonprofit and for-profit entities, including independent motion picture theatre operators, museum operators, promoters, and talent representatives.

Timing for opening the application process is uncertain. SBA will provide further web updates and video guides about the grants, who can apply, how potential organizations can prepare, and additional details regarding eligibility and applications.

- SBA webpage on Shuttered Venue Operators Grant: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/shuttered-venue-operators-grant>
- SBA Shuttered Venue Operators Grant FAQs: <https://www.sba.gov/document/support-shuttered-venue-operators-grants-faq> (Updated February 12, 2021)

## Paycheck Protection Program (PPP)

More than \$280 billion in new PPP relief is now available, including a second opportunity to apply for forgivable loans, accessible through March 31, 2021. The SBA has opened the 2021 PPP to all applicants, and has issued initial guidance, including revisions to the loan forgiveness process and opportunities to apply for a second round of forgivable loans. As of February 7, 2021, more than \$100 million of new PPP loans had been approved.

The overall terms for loan forgiveness are now more flexible, as borrowers will be eligible for loan forgiveness equal to the amount of allowable costs spent during a period of their choosing, between 8 and 24 weeks following the origination date of the loan. Meanwhile, many are still awaiting the outcome of loan forgiveness applications for the first round of loans, as lenders and the SBA have shifted attention to new loan requests.

A second draw of forgivable loans of up to \$2 million is now available to employers with a workforce that does not exceed 300 employees and that can demonstrate at least a 25% gross receipts decline in any quarter of 2020, compared to 2019. As with the first round of PPP, loan amounts equal 2.5 times average monthly payroll costs.

- PPP Overview Page and Links to First Draw, Second Draw, and Loan Forgiveness Guidance: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck>

-protection-program

- Data on 2021 PPP Loans Approved: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/ppp-data>

## Employee Retention Tax Credits (ERTC)

The Employee Retention Tax Credits (ERTC) created under the CARES Act are refundable payroll tax credits accessible to nonprofit organizations and are now significantly expanded.

The 2020 credit applied to 50% of qualified wages, up to \$10,000 in wages/year, and PPP recipients were previously ineligible to access the ERTC. The 2020 ERTC is now retroactively available to 2020 PPP recipients for certain wages not covered by PPP forgivable loans.

The 2021 credit is valued at 70% of qualified wages, up to \$10,000 in wages/quarter per employee for the first two quarters of 2021, amounting to up to \$14,000 in refundable payroll tax credits per employee. Employers that receive Paycheck Protection Program loans in 2021 will qualify for the expanded ERTC for wages that are not also covered by a forgivable PPP loan.

Complete guidance on the ERTC is still awaited. In the meantime, the IRS has issued an initial overview, and the 2019 FAQs are a good starting point for becoming more familiar with this provision.

- IRS January 27 ERTC Announcement: <https://www.irs.gov/newsroom/new-law-extends-covid-tax-credit-for-employers-who-keep-workers-on-payroll>
- Background FAQ on 2019 ERTC (to be updated): <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>

## Paid Sick and Family Leave

The refundable payroll tax credits for paid sick and family leave that were established in the Families First Coronavirus Response Act, are extended through March 31, 2021.

- IRS 2021 Paid Leave Overview: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-paid-leave-provided-by-small-and-midsize-businesses-faqs>
- Families First Paid Leave FAQ: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-basic-faqs>

## Pandemic Unemployment Assistance and Compensation

Pandemic Unemployment Assistance will be extended, providing federal unemployment benefits for self-employed and gig workers who are affected directly by the pandemic but are not typically eligible for state unemployment benefits. Federal Pandemic Unemployment Compensation benefits that expired earlier this year are reinstated at \$300 per week, through March 14, 2021. An extra \$100 per week will be available for workers who have both W-2 and self-employment income but whose base benefit calculation doesn't take their self-employment into account.

The League of American Orchestras will continue to update its 2021 relief overview online as more information becomes available, and is partnering with arts advocates >

nationwide to speak up in support of additional COVID-19 relief opportunities in the coming weeks and months. 

*Note: the author is Vice President for Advocacy for the League of American Orchestras.*

## Facing Furloughs with Fundraising

By Mike Muszynski

In response to the Coronavirus, the vast majority of ICSOM orchestras have continued to employ their musicians under modified structures, but a select few have instead cancelled either a portion or the entirety of their 2020–21 seasons, shutting down entirely and leaving furloughed musicians to rely on unemployment and stimulus checks.



Courtesy of the Indianapolis Symphony

Among others, the musicians of the Indianapolis Symphony Orchestra, the Metropolitan Opera Orchestra, the Nashville Symphony Orchestra, the Phoenix Symphony, and the Virginia Symphony Orchestra have all been furloughed by their managements for an extensive period of time over the course of the last ten months. While the dynamics of each shutdown are unique, the response from the musicians of these orchestras shows a common desire to take care of one another.

By far the largest group of furloughed ICSOM musicians comes from the Metropolitan Opera Orchestra, who have been receiving health, instrument, and life insurance, but no pay since April 1, 2020. Since then, musicians have been performing their own concert series, designed not only to raise money, but to collaborate and inspire one another while raising awareness about the orchestra.

This effort, the MET Orchestra Spotlight Series, highlights musicians from the orchestra as well as friends of the orchestra (such as Angela Gheorghiu). Modestly priced tickets are sold through the MET Orchestra website, and patrons can either watch the performances live or stream them for a period of time after the premiere.

Ticket proceeds benefit the MET Orchestra Musicians Fund, which disburses need-based grants that are approved by an independent board of directors. It was important that these grants remained need-based as ICSOM delegate Javier Gándara explains: "If the people who are most vulnerable are taken care of, you are going to feel more comfortable about the unity of the group and more confident about the strength of the upcoming contract."

Though there was no set goal at the start of the fundraising, the MET Orchestra has raised nearly \$500,000 for their fund and have just recently ended their first round of grant disbursement. Tickets for upcoming performances (including a recent concert on February 21) can be found at <https://www.metorchestramusicians.org>.

When the musicians of the Phoenix Symphony saw their 2020–21 season cancelled, they ended up settling on a contract that would continue only their insurance coverage, leaving them with no salary whatsoever.

Anticipating that unemployment compensation would end

sometime in the fall, the musicians of the orchestra realized that some would be hit hard by the loss of income, such as those with medical bills and the younger musicians with little savings or high student-loan debt.

The orchestra committee began a \$30,000 fundraising campaign via GoFundMe and asked the nonprofit MusiCares to administer the relief fund in order to anonymize the process of approving need-based grants.

"As we planned how to remain active in our community, we wanted a centralized, accessible, online fundraising portal where community supporters or other musician associations could donate towards our relief fund. Starting the fund online also allowed us to easily connect the donation ask to our existing Musicians' social media channels, as well as a new website and newsletter," explained ICSOM delegate Peter Lorenzo Anderegg.

The Musicians of the Phoenix Symphony are still working towards their goal at <https://www.gofundme.com/vjnqdt-fundraiser-for-musicians-of-the-phoenix-symphony>.

In Indianapolis, it became apparent that musicians would be furloughed for a second time starting in June 2020, this time with a loss of health insurance. In response, orchestra musicians set up a PayPal account to collect funds and began scheduling outdoor performances to help raise funds and ensure that the orchestra musicians remain an active part of the artistic community.

"It was apparent from the start that our concerts resonated with people, because we would see an immediate increase in fundraising afterward," says Brian Smith, Orchestra Committee Chair. "We heard time and time again how much people wanted to help out our musicians."

Currently, the musicians of the Indianapolis Symphony Orchestra are no longer furloughed, as they reached an agreement to be paid a modest stipend that began in January 2021. Health insurance was restored in September 2020 as part of that agreement. Fundraising for the Musicians' Emergency Relief fund continues at <http://isomusicians.org/donate>.

Similarly to Indianapolis, the musicians of the Nashville Symphony Orchestra have recently ratified an agreement to receive a weekly \$500 stipend as well as a continuation of healthcare coverage in exchange for "non-traditional" work services.

However, in the wake of their earlier furlough and cancelled 2020–21 season, the orchestra committee began fundraising and performing to both provide for their musicians and remain active in the community, notably through both performing and volunteering at local food banks.

While performances and volunteer work continue for the Nashville musicians, their emergency fund will close to new public contributions as part of the ratification of their current agreement. Public money that is donated after the start of the agreement will be turned over to the Nashville Symphony Association and earmarked for use in the musicians' stipend.

The musicians of the Virginia Symphony Orchestra have been furloughed since August 2020, and started a GoFundMe campaign with an ambitious goal to raise \$50,000.

The purpose of the fund is primarily to take care of members who have not been eligible for unemployment, but also to cover any gaps between the end of unemployment compen- >

sation and the beginning of employment. In addition, many musicians are now responsible for medical premiums for spouses and dependents, which had previously been covered by paycheck deduction.

The majority of the fund is reserved to help individual musicians with insurance, living expenses, and other similar costs, but an anonymous committee was created in Fall 2020 to deal with smaller funding requests.

As the musicians of the Virginia Symphony Orchestra go back to work on February 23 for the first in a limited number of work weeks, their public campaign will end, but their GoFundMe page remains at <https://www.gofundme.com/f/vso-musician-relief-fund>.

In response to the work these hundreds of musicians have undertaken to raise funding for their memberships, many ICSOM orchestras have lent financial support. With these contributions and those of local communities, there is hope that the musicians of these five orchestras will not only be able to make ends meet for themselves and their families, but may also find themselves in a stronger position once they are invited back on stage by their managements. 

*Note: the author is the ICSOM Delegate for the Indianapolis Symphony Orchestra.*

## San Francisco Symphony Launches New Streaming Service

By James Button

After a year of cancelled seasons, pay cuts, and dark stages, some bright spots are beginning to appear on the orchestral horizon. The brand new partnership between Music Director Esa-Pekka Salonen and the San Francisco Symphony has yielded its first joint venture: SFSymphony+. Announced in mid-January of this year and



David Kim

launched on February 4, SFSymphony+ (SFSymphony Plus) is a new on-demand streaming service. It is a brand new, membership-based service that will feature exclusive original digital content including all new SoundBox programs (the symphony's experimental concert series) and CURRENTS episodes (a new series exploring rich intersections between musical cultures) as well as other special projects. Select, free-of-charge content, including previously released orchestral programs, newly recorded chamber music, and the symphony's 2021 Chinese New Year Virtual Celebration, will also be a part of SFSymphony+.

In discussing the new venture, Music Director Esa-Pekka Salonen explained his vision: "The challenge with digital programming is to create something that has its own identity, an essential uniqueness that allows it to function as a self-contained piece of art. And to achieve that, it's not enough just to capture a great performance by strong musicians, or even to have interesting programming. Instead, every member of the organization—on the performance level, on the production level, on the administrative level—needs to be working in harmony, drawing upon one another's talents and strengths. What we've created for SFSymphony+ could not have been

realized in a traditional live setting. My hope, once live performances resume, is that we can sustain the dialogue between digital and live performances to create something that audiences will find compelling and valuable—not only in the Bay Area, but across the world."

Priced at \$120 for the whole season, SFSymphony+ memberships will provide exclusive access to premium original San Francisco Symphony digital content, including seven SoundBox programs, five new CURRENTS episodes, as well as other special projects to be announced. The individual SoundBox programs and CURRENTS episodes will also be available à la carte, for \$15 per episode. These episodes will be between 30–55 minutes and will remain available for on-demand streaming indefinitely after purchase.

SFSymphony+ joins several other streaming endeavors launched by major orchestras, including Boston's BSO NOW, Chicago's CSOtv, New York's NYPhil+, and Philadelphia's Listen On Demand (*Note: See "Newslets" in the March 2020 issue*).

Programming for its inaugural season includes digital SoundBox programs curated by Music Director Esa-Pekka Salonen, Destiny Muhammad, and SF Symphony's Collaborative partners Julia Bullock, Nico Muhly, and Claire Chase. CURRENTS episodes will explore Indian Classical, Native American, Zimbabwean, Persian, and Klezmer musical cultures.

All SF Symphony musicians, donors contributing over \$250, and 2020–21 Season subscribers will automatically receive a complimentary membership in SFSymphony+, and memberships for others are on sale at [sfsymphonyplus.org](https://sfsymphonyplus.org). While only available now for browser-based streaming, apps for smart phones, tablets, and TV's (Apple TV, Amazon FireTV, Chromecast, Roku, Smart TVs) are in the works and will be coming soon. 

*Note: the author is the ICSOM Delegate for the San Francisco Symphony.*

## Newslets

### San Francisco Opera Returns to the Stage

The San Francisco Opera (SFO) announced a return to live performances—but not at its usual venue, the War Memorial Opera House.

Instead, SFO will stage a drive-in production at the Marin Center in San Rafael, an abridged 90-minute version of Rossini's *The Barber of Seville* with no intermission. The expurgations include the chorus and a few of the characters.

The audience for the scheduled 11 performances will have a choice of two views: one will be of the set and the live performers, the other will be of a live simulcast projected onto a drive-in movie screen. After the performance run is complete, SFO plans to make a stream of the production available for purchase.

The SFO musicians, in addition to preparing for a return to live performance, have also been creative in other ways. They designed and introduced a double-layer facemask, in conjunction with the roll-out of their new T-shirts. The facemasks also include a pocket into which the wearer can insert >>

a filter, providing additional protection. The branded face-masks and shirts are part of the musicians' efforts to remain connected to the community in the absence of live performances, resulting from local government closure of the Opera House.

## Colorado Receives Large Gift

In late December 2020, the Colorado Symphony Association (CSA) received a gift of \$2 million from an anonymous donor. The gift will allow the organization to continue to pay for musician and staff salaries and healthcare at least through June of this year.

The gift is part of record calendar-year-end fundraising for the orchestra, according to a press release. The CSA has raised over \$4.1 million since the beginning of the fiscal year on July 1, 2020, which has enabled the organization to expand education programs in addition to continuing to pay wages.

"The musicians of the Colorado Symphony are deeply grateful for this major anonymous gift," said Jason Shafer, Principal Clarinet and Chair of the Orchestra Committee. "This incredible donor realizes the cultural importance of having a full-time orchestra in the state of Colorado, and the musicians are so excited to bring live music back to our community as soon as safely possible."

## Pittsburgh Still Celebrates

On Saturday February 27, 2021, the Pittsburgh Symphony Orchestra will air a special gala episode of its digital series, Front Row, honoring its one hundred and twenty fifth anniversary. What started as an ambitious plan to honor such a momentous occasion has been distilled into two events: the release of a new recording of Beethoven's Ninth Symphony under the direction of music director Manfred Honeck, and the final installment of the PSO's initial set of episodes in its digital series Front Row, produced by Pittsburgh production company Flying Scooter.

Initially plans for the celebration included a European summer festivals tour coinciding with celebrations of Beethoven's 250th birthday, with appearances in Salzburg and Grafenegg, among others, then returning to Pittsburgh to kick off a year-long celebration throughout the city. Since the PSO shares its founding date with the Carnegie Library of Pittsburgh, plans to perform all of the Beethoven string quartets in those libraries were also on the program, as was a performance of Mahler's massive eighth symphony, and an ambitious plan to perform all of Beethoven's symphonies in one week at diverse and unique locations throughout the Pittsburgh community.

With the outbreak of COVID-19, a mask mandate in the state of Pennsylvania, as well as limits on gatherings to no more than 25 people indoors, caused all those plans to change. Instead of indoors at the Carnegie Libraries, outdoor locations such as UNESCO world heritage site Fallingwater and aircraft hangars hosted small ensembles of the PSO, performing repertoire that rarely graces the stage at the orchestra's home, Heinz Hall for the Performing Arts. New Principal

Pops conductor Byron Stripling, a trumpet virtuoso and gifted singer, pivoted to doing interviews with prominent community members in place of trumpet solos from the podium. The performances captured at these locations, as well as at Heinz Hall, form the backbone of Front Row, the PSO's new digital concert series.

"Looking toward the Pittsburgh Symphony's future, I am enormously grateful for the 125-year-old commitment between the Orchestra and this great city," said Honeck. "The Pittsburgh Symphony always strives to achieve the extraordinary, and that starts with great music and the deep connection between our beloved audience and musicians." Here's to another 125 years of sharing great music with the Pittsburgh community and the world. 

## No Economic Recovery (continued)

ing locally or purchasing gift cards, please don't forget about the arts institutions and artists who live and work among us. You can show your support by making a donation, buying a gift certificate, viewing an online performance, or making a plan to see a show once it's safe to do so.

Musicians, actors, and dancers will play an essential role in the emotional healing and celebration that will take place when we can safely congregate again. Our community must not let these treasured cultural institutions and artists fall victim to the pandemic.

One thought—assuming it's safe, why not plan a weeklong celebration over the summer to visit together again, see shows, eat out, and shop? It may be just the jump-start businesses and institutions will need coming out of the pandemic.

Perhaps, Christmas in July? 

*Note: the author is an ICSOM Member at Large and the president of Local 104.*

## Immunizing Our Orchestras (continued)

the right to bargain, including through specific contract language the union has agreed to in a CBA. Unfortunately, as I discussed in a previous *Senza* article (*Note: see "The Radical New NLRB" in the December 2019 issue*), the legal test regarding waiver has changed significantly in recent years. Before the Trump administration changed the makeup of the National Labor Relations Board (NLRB) by appointing aggressively pro-employer Board members and General Counsel, a waiver needed to be "clear and unmistakable" to relieve the employer of its duty to bargain. Only if the union and employer "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term" would the NLRB find a waiver. For that reason, employers who tried to rely on management-rights clauses—those that typically reserve to the employer "the right to run its business" or "promulgate reasonable rules and regulations"—to unilaterally implement policies and procedures typically found no joy at the NLRB. Pre-Trump, the NLRB consistently found that such broadly worded language is not specific enough to find a waiver.

The current NLRB totally changed that standard. Under its 2019 ruling (*Note: see <https://apps.nlr.gov/link/document.aspx/>*)

09031d4582d55813) in *MV Transport*, 368 NLRB No 66, the new test is whether a rule or procedure implemented by an employer without bargaining falls “within the compass or scope of contract language that grants the employer the right to act unilaterally,” based on “ordinary principles of contract interpretation.” That means that instead of looking for a waiver, the Board will now examine the CBA to see if the employer’s action is simply “covered by” an existing contract provision—including a management-rights clause. Only if the contract language does not “cover” the action does the NLRB examine whether a waiver has occurred.

So, under the current NLRB—the makeup of which will be with us for some time into the new administration, given that members serve staggered five-year terms—the answer to whether your employer must bargain over mandatory vaccinations will likely be found in your CBA. The management-rights clause will often be the focus. For example: if it contained language permitting the employer to “promulgate rules and regulations regarding the health and safety of employees,” the current NLRB would likely find that the employer’s right to require COVID-19 vaccinations is “covered by” that language—which would mean the employer would be able to implement mandatory vaccinations without being required to bargain.

But what if the management-rights clause were more broadly worded and did not specifically mention health and safety? For example, if the clause merely stated that management had the right to “direct its workforce” or “establish policies and procedures,” would a mandatory vaccination policy be “covered by” such language and permit the employer to implement it unilaterally?

There is no clear answer yet. Even under the old waiver standard, case law on mandatory vaccinations as a bargaining issue is sparse and the results mixed. In one case, a hospital implemented a mandatory flu vaccination policy for its nurses. The union filed a grievance, so an arbitrator (not the NLRB) heard the case. The management-rights clause gave the employer the right to “implement improved operational methods and procedures” and to “promulgate rules, regulations and personnel policies.” The arbitrator sided with the union’s position that such language would not permit a mandatory vaccination policy. When the hospital went to federal court to try to overturn the award, the Ninth Circuit Court of Appeals, applying the deferential standard of review through which courts examine arbitration awards, let the decision stand. See *Va. Mason Hosp. v. Wash. State Nurses Ass’n*, 511 F.3d 908 (9th Cir. 2007).

Afterwards, however, the hospital implemented a policy mandating facemasks for nurses who weren’t vaccinated. This time the union’s complaint was heard by the NLRB, which applied the old “waiver” standard but ruled that different language in the management-rights clause—management had the right to “determine the materials and equipment to be used”—indeed represented a waiver of the union’s right to bargain over facemasks. See *Va. Mason Hosp.*, 358 NLRB 531 (2012). (Note: For the ruling, see <https://apps.nlr.gov/link/document.aspx/09031d4580a9ce74>)

Given such inconsistent precedent and the changing waiver standards, it is difficult to predict with certainty how

the NLRB will view this issue. But since changing to the “contract coverage” standard in *MV Transport*, the NLRB has not hesitated to apply broadly worded management-rights clauses to permit employers to make unilateral changes without bargaining. A unilateral change requiring employees to take vacation time when taking FMLA leave was covered by language permitting the employer to make “reasonable plant rules and regulations of conduct.” Similarly, “the right to adopt reasonable rules and policies” permitted an employer to unilaterally revise its attendance policy to reduce the number of absences that would warrant termination.

The only real certainty is that the issue of bargaining over vaccine mandates will be heavily litigated. Any attempt by a unionized employer to unilaterally impose a mandatory vaccination policy will likely be met with an immediate demand for bargaining, followed by filing unfair labor practice charges if the employer refuses.

I recommend the same course for our orchestras: if your employer tries to unilaterally implement a vaccine mandate, then demand bargaining and consider going to the NLRB if the employer refuses. That should be the course even if the Local, orchestra committee, and musicians all agree that a mandatory vaccine is a good idea. By demanding bargaining, you are not necessarily saying “no” to a vaccine; rather, you’re requiring your management to discuss with you a workplace issue of utmost importance and negotiate a mutually acceptable agreement. Requiring that process is critical, regardless of what you ultimately end up doing with respect to vaccinations.

Although the NLRB will undoubtedly weigh in on this issue eventually, it takes time for charges to work their way up to a Board hearing; and, given that the Board will change over the coming years, it may be a while before the legal landscape is settled. As an interim step, sometimes the NLRB General Counsel will put out an advice memo on issues of immediate significance. Such memos are not binding authority, but do offer some indication of how the NLRB might view an issue. But, because the General Counsel is appointed at will by the President, a memo issued before January 20, 2020, might look far different from one issued a week later.

## 2. Employer Vaccinations Generally: It’s complicated.

Apart from any bargaining obligation, it appears likely that employers can mandate vaccinations, subject to limited exceptions. Employers have the right (indeed, the obligation) to maintain a workplace free of threats to the health and safety of their employees. That means that when faced with a contagious and deadly disease for which a vaccine is available that would prevent the spread of that disease in the workplace, an employer can mandate vaccinations; and, in a non-union workplace where employment is “at will” (and there is no state law to the contrary), the employer can terminate an employee who refuses.

In December 2020, the Equal Opportunity Employment Commission (EEOC) released guidance on this issue (Note: see <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>). While the EEOC did >

not explicitly affirm that employers can mandate vaccinations, the guidance assumes that employers have that right and instead addresses the legal implications of such a mandate.

The EEOC guidance confirms that there are essentially two exceptions available to employees who do not wish to be vaccinated: one based on health, the other on religion. Under the Americans with Disabilities Act (ADA), an employee can request an exemption from mandatory vaccination as a reasonable accommodation for a qualified disability. If the employee can provide medical substantiation that they may experience adverse effects from the vaccine, then the burden shifts to the employer to show that allowing the unvaccinated employee to come to work would be a “direct threat” to others in the workplace, and that there is no way to eliminate that threat without “undue hardship” to the employer.

That might be a difficult showing for many employers, including orchestras. For one thing, if the employer was operating safely before the vaccine became available—i.e., with the kind of robust safety protocols, distancing, and mask mandates that are common in many ICSOM orchestras—and kept operating in the same manner now, then it would be difficult for the employer to argue that inconsistent vaccinations among the workforce is truly a “direct threat.” In other words, if it were safe to come to work when no one was vaccinated, why would it suddenly be unsafe if only one or two people aren’t vaccinated? The calculus may change when the employer no longer keeps safety protocols in place, but that time is far away.

Further, employers who have permitted at least some employees to work remotely during the pandemic—as has been the case in many orchestras—would have a difficult time arguing undue hardship. Permitting an unvaccinated employee to work from home would obviously eliminate the threat to other employees; and if the employer has been allowing that throughout the pandemic, the employer can’t really argue it was an undue hardship all along.

With respect to religious exemptions, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of religion. To that end, employers must “reasonably accommodate the religious practices of an employee.” See 29 C.F.R. § 1605.2. The scope of “religious practices” is remarkably broad: aside from established religions, it encompasses “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” See 29 C.F.R. § 1605.1. However, the new EEOC guidance provides that an employer who has an objective basis for questioning the sincerity of a proffered religious belief can request “supporting information.”

Similar to ADA accommodations, the employer can refuse a requested accommodation if it would cause “undue hardship.” However, as the result of a 1977 Supreme Court case, *TWA v. Hardison*, 432 U.S. 63, the test for undue hardship is far more employer-friendly than under the ADA. If the requested religious accommodation would require the employer to “bear more than a *de minimis* cost,” it is an undue hardship. TWA also warned that an accommodation is not required if the result would be discrimination against other employees.

Therefore, in the case of a religious objection, if an employer can demonstrate that permitting an unvaccinated employee to come to work puts the safety of other employees at risk and that allowing the employee to work from home would increase costs to the employer by more than a minimal amount, then the “undue hardship” standard would be met and the employer could refuse the religious accommodation. Put another way, although the broad definition of “religious practices” may make it much easier for an employee to claim a religious objection than a disability, it may conversely be easier for the employer to invoke “undue hardship” to deny an accommodation for religious reasons than for a disability.

All that said, litigation on this question is virtually guaranteed. Given the age of the TWA decision, the trend in Supreme Court jurisprudence towards greater recognition of religious rights, and the Court’s new 6-3 conservative majority, the Court may well come up with new standards that are far more protective of employees seeking religious exemptions. (Indeed, there are petitions for certiorari currently pending that seek to overturn the “*de minimis*” test, though not yet with respect to vaccination.) This issue will keep courts busy for some time.

The EEOC guidance also addresses some practical concerns with mandatory vaccinations. Employers should not try to administer the vaccine themselves, or even contract with a third party to do so, because the questions that health providers need to ask vaccine recipients would violate the ADA’s prohibition on asking employees for disability-related information. (A better course for employers with vaccine mandates would be to require proof of vaccination.) Such information must be kept in a confidential file (like the screening questions and temperature checks that are now ubiquitous in workplaces). The guidance also reminds employers to engage in an “interactive process” with any employee who requests an accommodation, and warns them not to retaliate against such employee for asking.

### 3. Other State and Federal Laws: Clouding the Issue Even More.

As if the question of mandatory vaccinations weren’t complicated enough already, there are other layers. First, there is legislation pending in several states that would prohibit employers from requiring vaccinations of employees. (A bill introduced in the Minnesota legislature is an extreme version of this: it would make mandatory vaccination a felony, subject to a minimum 10 years’ imprisonment.) Conversely, one proposed bill in New York would actually require COVID-19 vaccinations for everyone in the state. (This is supported by the New York State Bar Association as well. *Note*: see <https://nysba.org/new-york-state-bar-association-calls-upon-state-to-consider-mandating-a-safe-and-effective-vaccine-if-voluntary-measures-fail-to-protect-public-health/>) There is a real possibility that the answer to the question of mandatory vaccinations will largely depend on where you live.

Second, the expedited approval process for the new COVID-19 vaccines may be significant. These vaccines were approved pursuant to the FDA’s “Emergency Use Authorization” (EUA). FDA guidance regarding products made avail- ➤

able under EUA states that recipients must be informed they have the right to refuse administration of the product. To that end, the fact sheet for health care providers administering the Pfizer vaccine (*Note: see <https://www.fda.gov/media/144413/download>*) instructs providers to inform the recipient that they have “the option to accept or refuse” the vaccine; and the fact sheet for recipients (*Note: see <https://www.fda.gov/media/144414/download>*) reiterates that “it is your choice to receive or not receive the Pfizer-BioNTech COVID-19 Vaccine.”

There is not a well-developed body of law regarding EUA, let alone the application of an EUA product to employment practices. But certainly, one could envision an argument that an employer should not be permitted to require employees to take a vaccine that was approved by the federal government on the condition that the recipient has a choice whether or not to take it.

#### 4. What’s the best approach?

Given the uncertainty in the legal landscape and the myriad of bargaining, ADA, Title VII, and other issues that come into play, it is hard to imagine that any orchestra management—or any employer, really—would plunge ahead with a mandatory vaccination policy. (Indeed, much of the legal guidance issued by management-side law firms since the EEOC guidance was published warns against mandates.) Such a policy would only be inviting lawsuits and/or unfair labor practice charges, not to mention prominent media attention.

For the same reason, orchestra committees and Locals should proceed carefully. As I mentioned earlier, if your management tries to implement a vaccine mandate, then at the very least, request bargaining (and consider going to the NLRB if management refuses). Each committee and Local should be empowered to determine what is best for their musicians.

But even a bargained agreement requiring vaccinations for every musician in the orchestra has pitfalls. Aside from the host of legal implications discussed above, it is highly unlikely that the musicians in any orchestra will be of one mind on this issue; and when it comes to what we do with our bodies, or our religious views, the beliefs are often strongly-held and vociferously expressed. The potential for conflict and division within the orchestra is high.

We all dream of a day when COVID-19 vaccination has become so widespread that we’ve achieved something like herd immunity and musicians can return to work without masks, without playing 10 feet apart, and without fear. Mandatory vaccinations may provide a quicker way to get there. But on the other hand, a voluntary vaccine policy, together with a focus on education and encouragement, may get us there more smoothly. It is also impossible to separate employment concerns with the issue of vaccinations in society at large, a society that, as we know, seems almost hopelessly polarized, with a tendency to politicize nearly every issue having to do with the coronavirus. Proceed with caution. 

*Note: the author is ICSOM General Counsel*



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