

Bargaining for a Safe Return to the Symphonic Workplace: Process and Principles

Symphonic Services Division, American Federation of Musicians

Some orchestral employers have started to plan various scenarios under which musicians might come back to work — e.g., through some combination of small ensembles, socially-distanced audiences and streaming of content. Many musicians are anxious to resume work, for reasons both economic and non-economic; many others are justifiably concerned that in the absence of a safe, effective and widely available vaccine for COVID-19 there can be no completely safe return to work. Tremendous uncertainties remain with regard to what may constitute effective safety protocols for symphony, opera and ballet orchestras in the context of the COVID-19 pandemic. There is insufficient rigorous scientific research into the mitigation of risk for musicians rehearsing and performing in traditional performance spaces. The patchwork of local, state and federal guidance on “re-opening” further complicates the picture. We cannot afford to rush the process of returning to work; there are simply too many unknowns and the stakes are literally life or death.

However, it is not too soon to begin thinking about the process by which AFM Locals and Orchestra Committees can begin to bargain protections necessary to ensure to the greatest extent possible the safety of musicians when they do return to work. It is also the right moment to consider some of the over-arching principles of which we should be mindful as we embark on this process. This guidance addresses the bargaining process for a safety plan and the principles that should inform it.

1. The employer is responsible for providing a safe workplace.

There can be no question that it is the employer’s responsibility to ensure that the workplace is safe. The employer controls the workplace. Symphonic employers either own or rent the buildings where rehearsals and performances take place. Employers direct not only the musicians’ work but also the work of the many other individuals who support our work, including operations and artistic staff, stage management and crew, and facilities maintenance staff. Notwithstanding their legal duty to ensure a safe workplace, employers are in the best position as a practical matter to manage those aspects of the workplace that protect the safety and wellbeing of everyone who works there. The COVID-19 pandemic only reinforces the importance of this duty.

A corollary to the employer’s duty to provide a safe workplace is that the employer is liable when an employee is injured in the course of work. No employer should ever ask a musician to waive the right to file a Workers’ Compensation claim or seek other redress against an employer if the musician is injured in the workplace, which includes contracting COVID-19.

2. Employee health and safety are mandatory subjects of bargaining.

In the collective bargaining context, working conditions like health and safety are among the subjects that must be bargained between an employer and the employees' designated representatives, i.e., the Local Union and the Orchestra Committee. In the context of the pandemic, our symphonic employers must sit down and talk with us about how they intend to ensure the musicians' safety in the workplace. Just as we have traditionally bargained about other health and safety issues like service lengths, hearing protections and backstage lighting, we will now bargain about the timing of the return to work and the protections necessary to rehearse and perform safely during the pandemic.

Although the employer is responsible for the safety of the workplace, it may not unilaterally implement safety protocols without giving us notice and the opportunity to bargain over them. Nor may it bypass the Local and OC, going directly to individual musicians to press them to agree to conditions that have not been properly bargained. To avoid this happening, Locals and OCs should be proactive, demanding bargaining over health and safety well before any return to work is scheduled. Advise your members to contact you if they are approached directly about conditions for a return to work.

We should also press our employers to share with us their plans for protecting the health of our audiences, as they return to our concert halls. While these plans are not directly within the scope of our own working conditions, we have a vested interest in making sure mis-steps are not made that cause harm to those who support us and reflect badly on the institution as a whole.

3. Any plan for a return to work must comply with the directives of the relevant civil authorities.

It should be obvious, but musicians cannot be asked to return to work in defiance of stay-at-home or shelter-in-place orders. Musicians who live across municipal, county, state or even national borders from their place of employment may face obstacles to travel and should not be asked or expected to violate orders in effect where they live in order to travel to the workplace. Likewise, limitations on the number of people who may gather in an enclosed space must be strictly adhered to and viewed as minimal safety precautions.

4. Any plan for a return to work must be based on the best available science.

Until we have universally available and accurate instantaneous testing or a vaccine to prevent infection, returning to work will involve some level of risk. A vaccine could take another year or more to develop under the best of circumstances. Unless we are willing and able to remain at home until then, we must mitigate, to the greatest extent possible, the risk involved in returning to work. Bargaining over risk mitigation will be some of the most important work we do in the coming weeks and months. The health and lives of our members will depend on it.

With every passing week we learn more about the transmission of COVID-19. However, there are still many unanswered questions, particularly with regard to the specific risks of playing musical instruments together with other musicians. European studies have attempted to measure aerosols and droplets emitted from wind and brass instruments in order to determine the spacing necessary to ensure safety. Recommendations vary from as little as 2 meters (about 6.5 feet) to as much as 5 meters (over 16 feet). However, a study published in late March by the *Journal of the American Medical Association*¹ found that liquid droplets from sneezing, coughing and simply exhaling can travel more than 26 feet and linger in the air for minutes. Wearing a face mask helps mitigate this spread but surgical and cloth masks have gaps through which airborne particles can travel and of course masks cannot be worn while playing wind and brass instruments.

Social distancing protocols in general application—like wearing masks and maintaining a distance of at least 6 feet from others—will certainly be necessary but not sufficient to protect symphonic musicians in the workplace. Without peer-reviewed studies on transmission of the disease in conditions that parallel those of the symphonic workplace, we can only attempt to extrapolate from what is known about transmission of the disease to develop measures to prevent its spread in our workplaces. As we navigate this challenge and work to develop with our employers the protocols that will keep our family of musicians safe, we must always err on the side of caution. Our lives and those of our colleagues depend on it.

5. Musicians must have the opportunity to ratify any bargained return to work conditions and individual musicians must be allowed to choose to remain safely at home without penalty of any kind.

As discussed above, we cannot fully eliminate the risk of contracting COVID-19 in the workplace until we have a safe and effective vaccine. Until then, we can only mitigate risk to the best of our ability. We will do our best to bargain the greatest protections possible and we will not ask musicians to ratify any plan that we do not believe ensures the greatest possible degree of safety. However, each individual musician's circumstances and vulnerabilities are different and each must be allowed to decide whether a return to work, even under the safest conditions possible, poses an unreasonable risk to that musician's health or the health of a member of the musician's household.

While some factors have been identified as placing individuals at higher risk of adverse outcomes from COVID-19, the reality is that this disease has ravaged even young and healthy individuals with no pre-existing conditions. Accordingly, neither the employer nor the Local and OC are in a position to determine whether or not an individual musician is at high risk or to create an exclusive list of qualifying conditions that excuse a return to work. Only the individual musician can make that determination and no one should be asked or expected to return to work if they reasonably believe doing so would put their health at risk, or jeopardize the health of a member of their household. Nor should anyone who

¹ <https://jamanetwork.com/journals/jama/fullarticle/2763852>

chooses not to return for these reasons be penalized in any way, including, but not limited to, loss of tenure, seniority, accrued sick leave or compensation.

Suggestions on Process

As an initial matter, the Local and OC should be in close communication throughout the period when concerts have been cancelled. Schedule a weekly or bi-weekly zoom meeting just to check in with each other and talk over any issues that have arisen.

While dates may need to be adjusted due to the course of the pandemic, the scheduled start of the 2020-2021 season can serve as a target date by which to have safety protocols bargained, agreed upon, ratified and implemented. Some employers have already asked small groups of musicians to gather to record content that can be streamed; if that occurs in your orchestra, you may need to expedite the bargaining process and insist that no work can take place until a safety plan has been agreed upon.

Together, the Local and OC can reach out to management to ask what plans, if any, have been made to protect the health and safety of musicians when work resumes. This communication should remind management of its duty to bargain with us concerning the safe return to work and to refrain from dealing directly with musicians.

The employer may seek to reopen the contract and bargain more broadly over economic terms, especially if work cannot resume at the start of the season. Additional guidance will be forthcoming from SSD concerning contract re-opening but in short, whenever we are faced with a reopener request, our response should be that while we are not agreeing to reopen the contract, we are willing to listen to the employer's concerns and discuss them. This preserves our right to enforce the contract's terms as already bargained, while still signaling our willingness to work with the employer to address the situation at hand. By seeking to bargain over conditions for safe return to work we are NOT seeking to reopen the contract but merely to bargain over something that was not previously addressed in the contract.

We suggest the following course of action for bargaining the safety plan:

- a. Ideally, the employer should create an initial plan for how work may safely proceed. In the attached Appendix is an extensive, but not exhaustive, list of things that should be considered as such a safety plan is developed. There is no one-size-fits-all plan; every orchestra's rehearsal and performance space is different and each must be addressed on an individual basis.
- b. The Local and OC may consider creating a subcommittee that can focus on the details of the safety plan. Individuals involved in bargaining the safety plan (both union and employer representatives) should educate themselves and stay abreast of developments in our understanding of how best to protect musicians from infection in the workplace.

- c. If at all possible, the employer should engage an accredited epidemiologist or other qualified specialist to assist in the development of the plan and to review and approve the final plan, with a written report to be shared with us.
- d. The employer should present its plan to the Local and OC and should be prepared to answer any questions about the plan.
- e. Gaps and deficiencies in the employer's plan should be identified and remedied. As earlier stated, our approach should be conservative and cautious, always erring on the side of greater protection.
- f. As you evaluate the plan, imagine your work day, from the time you leave home to the time you return. Think about every surface you touch and each person you interact with. Can that contact be eliminated? If not, how can the risk of transmission be minimized?
- g. It may take substantial discussion and dialogue with the employer over several weeks to arrive at a completed plan. Consider whether a plan that looks good on paper will be workable in practice. Remember that it is in the employer's interest to work with you to develop a plan that protects the musicians from harm and engenders confidence among musicians and patrons. This should be an area where the union and the employer have shared goals.
- h. Once the Local and OC are satisfied that the plan is as comprehensive and protective as possible, it should be presented to the entire bargaining unit. Musicians should be encouraged to ask questions about the plan; if those questions cannot be answered by the Local and OC, they should be sent to the employer and answers should be provided to the musicians.
- i. After the entire orchestra has had a chance to review the plan, the Local and OC should survey the musicians to determine their confidence in the plan and their willingness to return to work under the conditions described in it. The survey may help identify areas of the plan that need adjustment in order for musicians to feel safe returning to work. Results of the survey should not be shared with the employer but should inform our position in additional discussions about the plan.
- j. When both parties are satisfied with the plan, it should be memorialized in a Memorandum of Agreement. The final plan should once again be presented to the musicians and any remaining questions should be answered. At that point, a ratification vote should be taken by secret ballot.

Additional guidance will be developed and issued as we learn more about best practices with regard to safety. SSD Negotiators are available to assist your Local and OC in bargaining a safety plan or any other aspect of dealing with the pandemic. If you have questions or wish to request a negotiator assignment please contact SSD Director Rochelle Skolnick at rskolnick@afm.org or 314-756-3858.

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