

## **Zoom v. In-Person Arbitration Hearings**

**By**

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In March 2020, in-person arbitration hearings came to a screeching halt in response to lockdowns related to COVID-19. Initially, most parties postponed scheduled hearings hoping the pandemic would be short-lived. But when weeks turned to months, hearings went online.

Now that much of the country is returning to a semblance of normal, parties often have a choice of whether to proceed in-person or online. Our new proficiency with online hearings gained during the pandemic makes it likely online hearings will become a permanent part of labor and employment law practice. Here are my observations on the relative advantages of each format:

Online:

- There is no safety risk to anyone from either the hearing itself or from associated travel. One or more participants may be particularly susceptible to COVID, but may not want to disclose it and hesitate to object to an in-person hearing for fear of implying such susceptibility. The arbitrator may be in a different risk category than employees or advocates.
- No one travels, which may save considerable time and expense.
- Eliminating travel makes scheduling hearings much easier. Consequently, an online hearing often can be scheduled much sooner than an in-person hearing.
- Parties don't pay for the arbitrator's travel time or expenses, which may result in a considerably reduced fee.
- Some advocates have told me they prefer an in-person hearing because witness credibility will be at issue. But if witness credibility is at issue, I'd rather see witnesses online than in-person at a distance with a mask.
- Hearings often run more smoothly, especially if the advocates exchange and agree on exhibits beforehand.
- There are no negotiations or disputes over social distancing, how many people to allow in the hearing room, mask-wearing protocols, and the like.
- It's easy to turn up (or down) the volume. If there are a lot of participants in a large hearing room, and everyone is masked and socially distanced, it can be difficult to hear whoever is talking.

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- Hearings need not be cancelled or postponed if a peripheral participant has a minor illness, because that person may still be able to participate online.
- An arbitrator capable of running an online hearing is likely to be technologically adept in other ways as well, and therefore more efficient.

#### In-person:

- No one gets dropped from a lost internet connection. In-person conversations aren't "choppy" or delayed.
- Some witnesses may not have great internet connections, or a computer or private room at home.
- There is no disagreement over which online platform to use, or over who will control the online meeting.
- Some witnesses may not be comfortable using the designated online platform.
- There often is cathartic value to the Grievant of "telling her story" with a Company representative physically present - this might be diminished somewhat online.
- It may be easier for advocates to "read the room" -- to pick up on nonverbal cues, both of witnesses and of the other folks in the room (including the arbitrator). An arbitrator can send a powerful message by putting down her pen -- a message that may be lost online. On the other hand, "reading a room" is considerably more difficult if everyone is masked and socially distanced.
- One employer-side attorney has expressed to me that his client doesn't like the optics of the workplace being open and employees expected to work, but hearings being held online. That send a message to employees that "our safety is more important than yours."
- Most arbitrators, before an online hearing, will hold a pre-hearing conference to discuss logistics such as how exhibits will be exchanged and introduced, whether the hearing will be digitally recorded, and how technical challenges will be addressed. A pre-hearing conference to discuss these issues isn't necessary for in-person hearings. However, these conferences can improve the flow of hearings and may result in the advocates agreeing on other issues, such as factual stipulations.
- Arbitrators in online hearings usually encourage or require the parties to exchange electronic copies of exhibits before the hearing. This may make it more difficult for the advocates to adjust their strategy on the fly (or, more cynically, to ambush the other side). However, it's still possible to introduce exhibits at the last minute in an online hearing, such as by sharing the exhibit on-screen, or sending the document by email.
- It may be more difficult to introduce physical evidence. If it is important for the arbitrator to see the physical place an incident occurred, video may not adequately convey the sense of space. The presentation of video evidence may be harder (or easier) online than in person.
- In an in-person hearing, it's usually obvious if an advocate is inappropriately conferring with a witness during a recess in the middle of the witness's testimony. In an online hearing, it's possible for the advocate and witness to turn off their cameras and mute their microphones, then use a mobile phone to call or text each other. Similarly, though

an online witness can be instructed to swivel her camera 360 degrees to verify no one else is in the room, it's probably easier for a witness to be coached during his testimony, or to have inappropriate documents in front of him, in an online hearing. Online hearings presuppose the advocates' and witness' ethical good faith and mutual trust.

After a year of physical isolation and social distancing, many of us are looking forward to in-person hearings being "normal" again. I suspect, however, that online hearings are here to stay, especially when hearing participants are scattered geographically or the parties are cost-conscious. That's not altogether a bad thing, because online hearings can help us return labor arbitration to its promise of a quick, efficient, and relatively inexpensive way to resolve labor disputes.