
RICK BALES, FOI, ON ONLINE LABOR ARBITRATION

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My friend and colleague Rick Bales posted the following on Workplaceprof Blog:

The Current Status of [Online?] Labor Arbitration

In March 2020, many states imposed stay-at-home orders because of the covid-19 pandemic. Most labor arbitration hearings were postponed. However, as it became clear that the pandemic would not be going away quickly, arbitrators and parties began to consider online hearings. A consensus quickly emerged that Zoom would be the online platform of choice because it, unlike most other platforms, has the functionality to create breakout rooms. The National Academy of Arbitrators (NAA) and Federal Mediation and Conciliation Service (FMCS) quickly organized a series of online tutorials for arbitrators on how to schedule and run a Zoom hearing.

One issue that quickly arose was whether an arbitrator could require a hearing to be conducted online over the objection of one of the parties. The position of the American Arbitration Association currently is that such a decision should be left to the discretion of the arbitrator. The NAA has provided this guidance in Opinion No. 26 (April 1, 2020):

In the absence of a collective bargaining agreement or an ad hoc agreement of the parties prohibiting such an arrangement, an arbitrator in exceptional circumstances, without violating the Code [of Professional Responsibility for Arbitrators of Labor-Management Disputes], may order that a matter proceed by way of video hearing in whole or in part without mutual consent and over the objection of a party. In doing so, the arbitrator must determine that a video hearing is necessary in order to provide a fair and effective hearing. * * *

When the issue arises, the arbitrator's first recourse should be to assist the parties in reaching a mutually acceptable resolution in the prehearing process. * * *

If agreement is not reached and it is necessary for the arbitrator to decide the issue of whether a matter will proceed by way of a video hearing over an objection, the arbitrator must consider the applicable circumstances and context of the request. Where, for example, a global pandemic makes it virtually impossible for an in-person hearing to be safely conducted, that factor may weigh in favor of the video hearing option, particularly if the

hearing has been postponed previously, a party in opposition is non-responsive or declines to provide a reasonable explanation, and/or the case involves continuing liability or time sensitive matters, such as an emergency health and safety issue. Government travel restrictions and family and health considerations of counsel or witnesses may also weigh in the arbitrator's decision to order or not order a video hearing. The factors favoring a video hearing may, in the arbitrator's judgment, be offset by countervailing factors, such as a party's lack of necessary equipment, difficulty in preparing and marshaling witnesses, or other limiting considerations. Further, the substance of the grievance might suggest to the arbitrator that a delay to allow for an in-person hearing does not seriously prejudice the rights of the parties.

As a practical matter, labor arbitrators have been reluctant to order online arbitration hearings over the objection of a party absent a showing that delay would result in significant prejudice. However, it is not yet clear whether this trend will continue. Some states have almost completely re-opened. Even in these states, however, arbitrators, advocates, parties or witnesses may be older or immunocompromised and therefore reluctant to meet in person. Many courts have postponed civil hearings and trials or moved them online, and arbitrators sometimes follow the practice of local courts. But if there is a new surge in cases, parties may become frustrated with further delay and more amenable to online hearings.

It also is not yet clear whether any move toward online hearings will be permanent or merely a temporary response to what we hope will be a short-lived pandemic. Most arbitrators and advocates still seem to strongly prefer in-person hearings, believing that such hearings give the advocates and witnesses a better opportunity than online hearings to "tell their story". However, as arbitrators and advocates become more proficient with the technology, and experience firsthand the cost savings (especially in reduced travel) and convenience of online hearings, such hearings likely will become much more common than they were before the pandemic even if in-person hearings remain the norm.

