



NATIONAL ACADEMY OF ARBITRATORS
VIDEOCONFERENCING TASK FORCE

**IS ARBITRATION BY VIDEOCONFERENCE
RIGHT FOR THIS DISPUTE?
A CHECKLIST FOR ARBITRATORS AND ADVOCATES**

Many in the labor and employment community are considering the use of arbitration by videoconference to accomplish fair and effective resolution of labor-management disputes. This checklist is provided as a resource for arbitrators and parties to decide whether videoconferencing is an appropriate tool for a particular dispute.

It is not intended to be exhaustive: Each labor-management relationship is unique, each dispute has its own characteristics, and the decision should reflect the nature of the specific dispute. In considering these factors, and others that may be relevant, the arbitrator and advocates should be guided by their professional obligations, consistent with the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (“Code”) (<https://naarb.org/code-of-professional-responsibility/>) and ethical requirements, as applicable. For considerations when parties disagree over the advisability proceeding via videoconference, see NAA Advisory Opinion No. 26. <https://naarb.org/wp-content/uploads/2020/04/CPRG-Advisory-Opinion-26-4.2020.pdf>.

Basic concerns:

- **Do the arbitrator and the advocates have sufficient technical proficiency required to conduct and/or participate fairly and effectively in a videoconference arbitration hearing?**
- **One possibility is to have an advisor or assistant handle the technical aspects of the hearing. In that case:**
 - **What safeguards are needed to ensure that the hearing will be fair and adequate for all parties?**
 - **Should the assistant or advisor be required to sign a confidentiality agreement?**
 - **If the assistant is being provided by one party, have the other party and the arbitrator agreed to this arrangement?**
 - **Have the parties agreed on arrangement for the assistant's compensation?**
- **Will the arbitrator be able to make any necessary determinations of credibility and of fact at issue in the case?**

Relevant aspects of the dispute:

- **Are there deadlines that favor a videoconference hearing?**
- **Are there unique issues that make an in-person hearing essential? For example, is a site visit necessary?**
- **Are there legal restrictions on the conduct of the hearing, such as an Open Meeting Law? Can they be satisfied via videoconferencing?**
- **Are there contractual restrictions that prevent the resolution of the dispute by videoconference over a party's objection?**
- **Are there accessibility or health concerns relevant to the hearing?? If so, are there solutions available to enable either an in-person or videoconference hearing?**
- **Are there issues of personal privacy of a participant or participants that should be considered in determining whether and how they can participate? (Someone may be reluctant for good cause to allow the intrusion of a videoconference into their living space.)**
- **Can the parties streamline the hearing with stipulations as to the issue, exhibits, and relevant and material facts?**

Technological requirements (to be explored for all expected participants):

- **Do the arbitrator, the advocates, and all necessary participants have access to reliable devices and internet connectivity to be able to participate in the videoconference, e.g., will everyone be able to see and hear each other when connected, and will witnesses be able to access and read any exhibits to which they are directed during their testimony?**
- **Will the parties be able effectively to present their documentary evidence via videoconference? Are there issues of privacy, confidentiality or security clearances that can be resolved to enable the presentation of evidence by videoconference?**
- **If a recording of the hearing is either required by contract or desired by the parties, can the parties agree on how the hearing will be recorded, at whose cost (if any), and for whose use?**
- **Does the videoconference platform available permit the arbitrator to control access to the "hearing room"?**
- **Can the arbitrator conduct a "sidebar" with just the advocates, either within the videoconference platform or by some other means?**

Finally, a quick synopsis of advantages and disadvantages of arbitration by videoconference:

- **Advantages**
 - **Health & Safety - In a pandemic, in-person contact and travel not required**
 - **Cost savings – no travel time or costs for the arbitrator, and savings perhaps for advocates and other participants**
 - **Scheduling – earlier dates may be available, with travel time unnecessary**
 - **Hearing efficiency – witnesses may not have to wait at an off-site hearing location, but can be summoned by phone or text only when needed for their testimony**
 - **Easier access to court reporters or interpreters for hearings otherwise in remote areas**
 - **Convenience – more flexibility as to participants’ location(s)**
- **Disadvantages**
 - **Lack of physical presence**
 - **Concerns about credibility (but there is research disputing the value of observed demeanor evidence – see discussion at p. 5-6 of the FMCS guide, “Video Arbitration: A Guide For Labor And Management Advocates” (<https://naarb.org/wp-content/uploads/2020/04/FMCS-Guide-to-Video-Hearings-for-Advocates.pdf>))**
 - **Unequal access to and proficiency with necessary technology and equipment**
 - **Privacy and security concerns – platforms have improved markedly and risk can be minimized, but concerns remain**
 - **Possibility of network, hardware or software glitches or failure**