Mashantucket Pequot Tribal Nation

MASHANTUCKET EMPLOYMENT RIGHTS OFFICE

Remote Video Hearing Policies and Protocols

With Instructions for Testifying at a Hearing Conducted via Videoconference

A. Overview

The MERO offers remote video and hybrid alternatives to in-person informal and formal hearings in cases under Title 32, the Mashantucket Pequot Labor Relations Law, and Title 33, the Mashantucket Pequot Tribal and Native American Preference Law.[1]

The current possibilities for a hearing before the MERO are as follows:

- **In-person** hearing at the offices of the MERO or other designated locations, where all parties and witnesses attend in person at the hearing. Any in-person hearing will have appropriate safety protocols.
- **Remote video** hearing where participants attend through videoconferencing in real time from various locations where they are alone or among a small group of participants.
- **Hybrid in-person/remote video** hearing where some participants attend in person at the MERO or other designated location, and some participants participate through videoconferencing.

While the MERO will work with parties to reach agreement as to the type of hearing appropriate for a given case, the MERO Director or the MERO Board will make the final decision. Remote video hearing or remote video participation will be considered only if the participants have the necessary technology and understanding to participate fully. Any Title 32 case that is referred to a Special Master will be subject to the Tribal Court's rules regarding hearing procedures. Regardless of the form of the hearing, any MERO hearing will be deemed to have taken place on the Mashantucket Pequot Reservation in Mashantucket, CT.

Parties, including individuals who are not represented by counsel, may receive assistance from the MERO to navigate the hearing process. However, the ultimate responsibility lies with each party, including self-represented parties, to comply with all hearing protocols.

Below are certain policies and protocols to be utilized for the MERO's remote video hearings, as they may be modified to accommodate the hybrid model or a particular case. These policies and protocols supplement any requirements of Tribal law or MERO procedures with respect to the conduct of hearings.

B. Video Platform

The MERO has chosen the platform Zoom for remote video hearings, which will be hosted by the MERO. The costs associated with the use of Zoom for a hearing will be borne by the MERO.[2] Zoom is a third-party platform; therefore, hearings conducted via Zoom are subject to Zoom's terms and policies. Any concerns

[1] For the distinction between an informal and a formal hearing, please see Title 40, the Mashantucket Pequot Administrative Procedure Act.

[2] The MERO's assumption of the costs unique to the use of Zoom does not include assumption of the typical hearing costs that are shared by the parties in a Title 32 MERO Board proceeding, such as the costs of court reporter and presiding officer services.

regarding the use of Zoom by the MERO should be raised as early as possible in any proceedings. Additional information about Zoom may be obtained at https://zoom.us.

C. Security Considerations

The MERO's hearings generally are closed to the public, typically involving confidential matters. Some of the measures that will be taken by the MERO and expected of the parties to ensure the security of a MERO remote video hearing include the following:

1. The parties will execute an agreement or receive an order setting forth certain terms of the remote video hearing, which may incorporate these policies and protocols, in whole or in part, by reference.

2. Generally, the MERO Director or Presiding Officer will host the hearing. Certain participants may serve as co-hosts at the MERO's discretion. For example, in a MERO Board proceeding, MERO Board members may serve as co-hosts to have greater Zoom functionality during the hearing.

3. A unique meeting ID will be used for entry to the remote video hearing. Access may also be password protected.

4. For most proceedings, hearing participants, including witnesses, are expected to:

    a. Maintain the confidentiality of the email meeting invitation and unique meeting ID and password, if applicable.

    b. Participate with live video as well as audio. Telephone participation may be permitted only on an as-needed basis.

    c. Use secure internet connections.

    d. Participate in non-public locations.

    e. Have immediately available at the hearing a form of photo identification, such as a license, in the event the photo ID is required to be shown to demonstrate identity.

    f. Refrain from any recording of the hearing, which is prohibited.

    g. Upon request, show their surroundings or answer security questions, including the identity of anyone else who can see or hear the proceedings through their participation. If there are more than one person at the location, all those present should share one camera, positioned to show all the participants and as much of the room as feasible.

    h. Take measures otherwise to ensure full participation of hearing participants and the exclusion of non-invitees.

    Parties are expected to assist witnesses in meeting the security expectations of the proceedings. If a party or witness is unable to make appropriate participation arrangements, the MERO may assist with a suitable location and/or technology, if available.

5. All participants, including witnesses, will be identified in advance, including their participation locations, if known, and the email addresses for each participant or participating location. Participants will be directed that their email invitations are not to be shared. The MERO recognizes that it may not always be feasible to identify all participants in advance and will accommodate approved last-minute additions with email invitations, as necessary.

6. During a hearing, certain features of Zoom may be utilized by the host, including the following:

   a. **Waiting room** – To avoid *ex parte* communications or disclosure of private communications, the admission of the participants to the hearing may be controlled by use of the waiting room. Participants wishing to join the proceedings will be held in the waiting room until they are admitted by the host.

   b. **Lock meeting** – Once all initial participants are present, the hearing may be locked for the duration, except to permit a new participant or witness entry.

   c. **Chat feature** – The private chat feature will be disabled, such that any chat message is distributed to all participants, to avoid the possibility of private messages being recorded.

   d. **Breakout Rooms** – Breakout rooms allow for private discussions among those who are in a designated breakout room. Participants may be assigned to breakout rooms consistent with the requirements of the proceedings. Participants will receive notice when breakout rooms are activated and when breakout rooms are about to close and everyone is returned to the main room. While in a breakout room, a participant may seek to speak with someone outside the breakout room by activating the "help" feature to get the attention of the host. Breakout room discussions will not be recorded, even if the proceeding is being recorded otherwise.

   e. **Mute –** To help preserve the quality of the sound, participants may be asked to mute themselves when they are not speaking or may be automatically muted by the host. For example, when participants leave a breakout room to join the main room, they may be muted initially to ensure that no private discussions are revealed.

   f. **Screen Sharing –** For security and privacy, participants may be blocked from screen sharing. An exhibit may be shared by the host or the screen sharing capability may be afforded a party temporarily for purposes of sharing exhibits.

D. Pre-Hearing Conferences

Pre-hearing conferences via Zoom may be held in advance of the hearing, depending on the needs of the particular case. Below is a sample schedule.

1. **Pre-hearing Conference 1:** Prior to the MERO confirming an agreement or issuing an order setting forth hearing arrangements, a pre-hearing conference may be held to discuss the terms for the hearing and any unique circumstances of the proceedings. The first pre-hearing conference generally will be held no later than 14 to 21 days before the start of the hearing. The agreement or order setting forth the terms for the hearing will issue after the first pre-hearing conference. The matters addressed may include:

a. Objections to any aspect of conducting the hearing via videoconference through Zoom.

b. Narrowing issues in dispute.

c. Establishing deadlines prior to the second pre-hearing conference for the parties to:

   i. submit their documents and other exhibits, with exhibit lists;

   ii. submit their witness lists;

   iii. identify any hearing participants other than witnesses;

   iv. confirm that they have tested the technology with their witnesses;

   v. submit the names, email addresses and phone numbers for all hearing participants for purposes of the hearing invitations.

d. Demonstrating the features of the videoconferencing platform, as necessary.

e. Providing procedures for the parties to follow for reaching agreement regarding exhibits or facts, as necessary.

f. Discussing the volume of documents and other exhibits anticipated and determining the naming convention for exhibits and the manner by which exhibits will be marked, circulated and made available during the hearing.

g. Identifying any additional requirements for the hearing, including without limitation, the need for translators or accommodations, file size limitations, and the handling of physical evidence.

2. **Pre-hearing Conference 2:** Topics addressed at a follow-up pre-hearing conference, which may be held approximately two (2) to seven (7) days before the hearing include:

   a. Resolving any technology issues experienced by the parties or their witnesses, including the inability to ensure full audio and video participation from a suitable location.

   b. Addressing any disputes or challenges regarding witnesses or exhibits.

   c. Resolving any procedural issues, such as how a particular witness will be able to see an exhibit, etc.

   d. Resolving who will participate in any pre-hearing technology test deemed necessary.

   e. Resolving any remaining issues between the parties about the hearing process.

3. **Additional pre-hearing conferences:** Additional pre-hearing conferences through Zoom or otherwise may be scheduled as deemed necessary for the particular case, at the request of one or more parties or at the MERO's discretion.

E. Documents and Other Exhibits

Generally, only documents and other exhibits that are material to the issues in dispute may be entered into evidence. Any material exhibits will fall into one of two categories: (1) those exhibits that are marked for identification only, and (2) those exhibits that the parties agree may become full exhibits. Although the MERO will work with the parties to address any case specific concerns, below are potential protocols.

1. **Parties Confer**

   a. The parties or their representatives must confer about the exhibits each wishes to present at the hearing. Each party must provide copies of the documents it wishes to introduce to the opposing party.

   b. After discussion, the documents may be divided into two groups, those that the parties agree are material to the issues in dispute and will be offered as full exhibits and those about which the parties are unable to reach agreement.

      i. Example: The Employer may have a job description for the position in question that it wishes to introduce in evidence. The Claimant may agree that the document is the job description for the position in question and the job description is material to the issues in dispute. Here the parties may agree that the exhibit will be offered as a full exhibit.

      ii. Example: The parties may agree that a disciplinary notice is material to the issues, but each may have a different version of the document. Here the parties may not be able to reach agreement as to the correct disciplinary notice and each would mark their version of the notice for identification.

   c. The parties should confer about any redaction (blocking of words or images) on the documents to protect confidential information. If redaction is disputed, the document should <u>not</u> be distributed until the redaction issue has been addressed at a pre-hearing conference.

   d. The parties should confer on how they propose to enable participants to see and review the exhibits during the hearing. The MERO must be notified of any Zoom features or other aids the parties intend to use (e.g., whiteboard, Dropbox).

   e. Failure to exchange exhibits or confer in good faith regarding exhibits may result in the offending party being denied the opportunity to introduce the exhibit.

2. **Exhibits are Marked**

   a. Except as provided in 2(c), each exhibit shall be labeled and circulated in advance. Unless otherwise agreed or directed, each document shall be labeled with the party offering the exhibit and exhibit number. (e.g., Joint-1, Respondent-1, Union-1):

      i. Each in a separate electronic file, either a PDF or other readily accessible format, or

      ii. All in a searchable file with bookmarks

b. Each party's exhibit list shall include each exhibit number, a brief description and the number of pages (e.g., Respondent-1 – Job description-2 pgs.) Joint exhibits may be reported on a separate or party list as agreed by the parties.

c. Unless directed otherwise, rebuttal exhibits need not be produced in advance but should be prepared in advance to be easily transmittable.

3. **Exhibits are distributed**

a. After the parties have conferred and marked their exhibits, the exhibits a party intends to use at the hearing are circulated in advance to the MERO and, if applicable, the MERO Board and/or the court reporter. Only those exhibits that have been shared with the opposing party should be circulated.

i. For large volume cases, the parties may wish to consider using Dropbox. Note that Dropbox is a third-party cloud storage provider; therefore, its use is subject to Dropbox's terms and policies.

ii. For small volume cases, pre-marked exhibits may be circulated via email.

b. Regardless of the manner by which the exhibits are shared, they should be grouped and labeled appropriately. Exhibits clearly marked "Disputed" or "For Identification" will not be viewed by any decision makers in advance of presentation for dispute resolution or at the hearing for an admissibility determination.

c. Documents a party intends to use at the hearing with a witness, when the witness needs to have a hard copy available, may be sent as unannotated hard copies to the witness location in advance in sealed envelopes marked "Examination," "Cross Examination," and "Disputed," as applicable, with instructions not to open the envelopes unless and until so instructed.

d. Documents a party intends to use at the hearing with a witness, when the witness does not need a hard copy and the technology arrangements permit, may be presented through screen sharing at the hearing.

F. Witnesses

1. **Oath or Affirmation**

a. **Witnesses physically located in Connecticut.** For witnesses located within the State of Connecticut, the oath or affirmation shall be administered by the court reporter or the hearing officer by remote means.

b. **Witnesses physically located outside Connecticut.** Unless an alternative means of assuring reliable testimony is agreed and ordered, any party calling a witness who will be testifying from a location outside the State of Connecticut must make arrangements at its cost for the administration of an oath or affirmation to testify consistent with the laws of the state where the witness is located. An affidavit that the oath was properly administered may be required.

2. **Sequestration** (removal from overhearing or observing the proceedings or communicating with others involved in the proceedings about the substance of the hearing). Unless agreed or ordered otherwise, witnesses should be sequestered and should not be able to communicate with other witnesses during the hearing, including during breaks. A witness who is designated to assist counsel with the presentation need not be sequestered.

3. **Adequate technology and connectivity.** Each party is responsible for appropriate arrangements for its witnesses to be able to participate fully and comfortably in the hearing process, including the costs associated with the arrangements, while maintaining the security of the proceedings. If a party is an individual, the MERO may provide the party with assistance.

   Prior to the first pre-hearing conference, parties should test with each witness (including any third-party witness that the party has subpoenaed) the technology to be used during the hearing to make certain the witness does not encounter technology issues that could have been foreseen or resolved in advance.

   Arrangements for witnesses may include, without limitation, ensuring that the witness has the following:

   a. Working computer, webcam, microphone and speakers

      i. A desktop or laptop is preferred to a smartphone or tablet, on which the Zoom experience is not as robust.

      ii. Many older desktop and laptop computers do not have integrated webcams or integrated microphones.

      iii. A headset may improve the audio experience.

   b. Access to a stable internet connection

      i. 2Mbps (Megabits per second) upload and download bandwidth minimum

      ii. Strength of the internet connection may be tested by going to https://www.speedtest.net/

      iii. Broadband internet is the best choice. Wi-Fi or Ethernet is acceptable if speeds are high enough. Public Wi-Fi may not be used. If a witness uses a cell phone, direct the witness to stay in an area with a strong (4G, LTE, or 5G) signal and ensure they have enough data to last the entire call.

   c. Telephone, as necessary

      i. If telephone is the only option for audio or full participation due to lack of access to a computer with a webcam and speakers or a poor quality computer or platform audio, have the witness use a landline rather than a cell phone, if possible.

   d. Power source available

      i. Regardless of the technology utilized, the witness should make certain all devices are plugged in to power, or that they are adequately charged, with back-up power cables or batteries available.

e. Zoom personalization not permitted
   i. Witnesses may not use a virtual background, replace the live feed with their profile photo or use a name other than their proper name.

4. **A quiet surrounding that does not impose distractions.** Background noise should be eliminated, if feasible. Advise the witness that they may be asked to pan the room with their camera to show that no one else is present and they may be asked to verbally confirm anyone with them in the room.

5. **Sample instructions for testifying are attached.**

G. Recording a Hearing

Recording a hearing will be addressed on a case by case basis, provided these general principals apply:

1. Parties will be advised, generally in advance, if a proceeding is being recorded or auto transcribed by the MERO. Parties are expected to convey to their participants and witnesses if the hearing will be recorded.

2. Absent agreement of all parties and the MERO, no cloud or local recording or auto transcription by any participants other than the MERO through Zoom will be enabled or permitted.

3. The parties and participants may be required to confirm in writing that they will not record, save or otherwise capture any audio, video, files, documents, chat texts or any other data from the proceedings, through Zoom or otherwise, including through a cell phone, screen capture, screen shot or print screen.
4. If the hearing is formal, a court reporter (stenographer) will participate live via Zoom and the court reporter's hearing transcript is the official MERO record of the proceedings. Generally a recording through Zoom will not be enabled.

5. If the hearing is informal, the MERO may activate the Zoom cloud or local recording feature to record the proceedings.

6. Any unintentional impermissible recordings are required to be disclosed and appropriate arrangements made to destroy any copies.

   With respect to formal hearings, the court reporter's transcription of the hearing is the official MERO record that is retained by the MERO and made available to the parties to view or to purchase. With respect to informal hearings, any recording by the MERO will be retained by the MERO and may be made available to the parties to review, but not to copy or retain.

H. Breaks

Regardless of the manner in which the hearing is conducted, rest and meal breaks will be permitted. Parties may be asked not to leave a videoconference during a break, but rather to mute their microphones and turn off their video cameras for the duration of the break.

I. Technical Failures

Technical failures that result in communication interruptions may be experienced individually or collectively, for a short duration or for an extended duration.

1. Depending on the circumstances, a technical failure may result in:

    a. All participants being required to mute their microphones and turn of their videos until the individual rejoins the hearing.

    b. Formal proceedings continuing to be recorded by the court reporter to create a record of what transpired in the individual's absence.

    c. Participants being moved into breakout rooms where they may engage in private discussions with their respective party participants until the technology issues are resolved.

    d. Participants being moved to the waiting room, where they will wait for resumption of the hearing.

    e. The hearing being rescheduled for a later time or a later date and time.

2. The participants affected by a technical failure are expected to keep the MERO apprised, through the parties with which they are associated, if applicable, of efforts to resolve the technical issues.

J. Modifications

Any of the protocols for the MERO's conduct of a videoconference hearing set forth above may be modified on a case-by-case basis by the MERO Director or the MERO Board, as applicable.

K. Appeal/Enforcement

Any party that participates in a MERO hearing via videoconference by agreement or pursuant to an order of the MERO or MERO Board waives any right to seek to vacate a decision or oppose enforcement of a decision on the basis that the hearing was conducted by remote videoconferencing.

L. Hold Harmless

The MERO strives to ensure the integrity of all technology used in videoconference hearings. The MERO and its staff, and the MERO Board members, as applicable, will be held harmless of any claim for damages for any act or omission occurring during or in connection with a videoconference hearing, to the extent permitted by applicable law.

M. Other

With the exception of those aspects of the hearing that may be modified in accordance with these policies and protocols addressing the conduct of a hearing by videoconference, any MERO policy or procedure relating to the type of hearing being conducted continues in full force and effect.

Instructions for Testifying at a Hearing Conducted via Videoconference

1. Be ready early. Make certain you have everything you need available at your participation station, including a non-alcoholic beverage, any documents that you have been provided with, and your photo ID to show the camera to confirm identity.
2. Test the internet speed and connection. If the internet connection is shared with others, limit their use if possible. Use a hard-wire connection, if possible. If Wi-Fi is used, locate near the modem or router and turn off the Wi-Fi connection on other devices.
3. Consider camera positioning (preferably at face level and relatively close to you, with your face clearly visible), room lighting, and background, which should be neutral and not show personal items. You may not use a virtual background, replace the live feed with your profile photo or use a name other than their proper name. While in the hearing, you are expected to sit or stand and stay within view of the camera. Walking around or moving the camera may affect connectivity.
4. Silence desktop or mobile notifications. Eliminate background noise. Mute your audio when you are not testifying or asked to respond to a question. Unless explained otherwise, when you unmute your audio, you will be heard by everyone involved in the hearing.
5. Do not unmute and speak when others are speaking. Before answering a question that has been directed to you, unmute yourself and pause a few seconds before answering. Speak slowly and clearly. Stop if an objection is raised until given direction by the person(s) conducting the hearing.
6. If someone enters the room while you are in the hearing, identify the individual to the hearing participants.
7. Do not consult with anyone during the testimony. Do not have a chat window, texting application or similar system open by which communications could occur without everyone in the hearing being able to see or hear the communication.
8. Do not consult any documents during the testimony unless provided in advance for purposes of the testimony and/or specifically directed during the testimony to view the documents.
9. Do not record through Zoom or otherwise, including through a cell phone, screen capture, screen shot or print screen.
10. If you experience a technical issue and do not lose connectivity, bring the issue to the attention of the participants. You will be provided with a contact name and number to call if you experience a technical issue that results in a loss of connectivity.
11. Follow any instructions provided by the person(s) conducting the hearing.
12. When your testimony is complete, you will be asked to sign off from Zoom by selecting “Leave Meeting.”