



## NLRB Nixes Telephonic Pre-Election Hearing, Orders Remote Video Hearing Instead

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The NLRB, like many other institutions, has operated under social distancing conditions in recent weeks due to the COVID-19 pandemic. Earlier this week, however, the Board held that it would not permit just any type of remote proceedings in all circumstances. In [Morrison Healthcare](#), the NLRB regional director ordered a pre-election hearing to take place telephonically. The employer objected to the telephonic hearing and the issue was presented to the Board.

Under already-existing Board rules, unfair labor practice proceedings may take place with “video testimony by contemporaneous transmission from a different location” where there is “good cause based on compelling circumstances” is present. While this rule expressly applies to unfair labor practice proceedings, no such explicit rule exists for representation proceedings, such as the pre-election hearing in *Morrison Healthcare*.

The Board had no trouble extending the rule to apply to representation proceedings, allowing remote video testimony in such cases where good cause based on compelling circumstances is shown. However, the Board did not approve of the regional director’s order for a telephonic pre-election conference.

The Board had never before allowed hearings to take place by telephone in any type of proceeding due to concerns about not being able to observe witness’ demeanor during cross-examination or to determine whether a

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witness is relying on documentation or other sources in order to testify. Noting that these same concerns applied to the pre-election hearing in this case, the Board found the hearing could not go forward by telephone. However, because the COVID-19 pandemic presents “good cause based on compelling circumstances,” the Board ordered the pre-election hearing to proceed via remote video testimony instead.

Recognizing that not all pre-election hearings involve witness testimony, the Board approved the use of telephonic proceedings when no witness testimony will be presented, and when there is good cause based on compelling circumstances. This case demonstrates that, while technology has allowed the Board to continue operations, it is still important to make sure the tenets of fairness to all parties are observed.