

Professional Perspective

Best Practices for Internal Investigations During Covid-19

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Best Practices for Internal Investigations During Covid-19

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Just like that, the world has changed, but internal investigations must go on. In response to the spread of Covid-19, companies have continued to operate, with many employees moving their work to home offices. Those engaged in compliance or investigations have also had to conduct in-field work from home, because alleged misconduct persists and internal investigations cannot be stopped.

In the Covid-19 world, employees face deep uncertainty and feel pressure to perform and retain their jobs. For commission-based and other competitive roles, that could lead to an increased risk of employee misconduct.

Therefore, despite logistical challenges, companies must enforce compliance programs and ensure that their internal controls are working appropriately. Covid-19 will not be a defense to violations of law, and employees must still adhere to company codes of conduct.

When investigation teams cannot be in the field, there are steps they can take to monitor compliance and run effective, remote investigations. This article offers guidance on those steps.

Monitoring Hotlines and Reviewing Data

Before any investigation can begin, companies must take measures to ensure they are aware of potential risks and misconduct. In-house lawyers and/or compliance officers should continue to carefully monitor ethics hotlines for reports of misconduct. But in-house professionals will also need to engage in proactive measures to spot risk by reviewing data and identifying anomalies. They should ask such questions as: Are sales higher than expected in a certain region? Do the accounting records suggest unusual cash withdrawals or distributions? Did an employee report concerns about interactions with a foreign joint venture? Companies must be intentional in identifying and assessing red flags.

Restarting Halted Investigations

In the first few weeks of the Covid-19 response in March 2020, businesses and communities across the nation faced new stay-at-home orders and general confusion. In such an environment, it is no wonder that some internal investigations were paused. Investigative teams should now look at those halted investigations through the lens of the new reality to determine next steps.

As an initial matter, the team must take stock of the previously identified custodians and witnesses and their employment status. In particular, there may be added challenges to conducting interviews when the relevant witnesses are laid off or furloughed. Former employees may choose to participate in a voluntary—not mandatory—interview.

Furloughed employees likely can be interviewed as well; typically they are bound by any contractual requirements to cooperate in internal investigations. However, the company may need to compensate the furloughed employee for the time spent (for non-exempt employees) or the full week (for exempt employees). Because of the added complications, the investigative team might prioritize interviews of furloughed employees to only those who are most relevant to the investigation.

For investigations in their final stages, there may be a new reluctance to make termination decisions for employees working remotely or taking protected leave. Employers can continue to hold employees to performance and conduct standards but should be cognizant of whether employment actions during this period heighten litigation risks, such as an employee claiming retaliation for taking protected leave. To the extent any expectations related to employee performance do change, those expectations should remain objective and should be clearly communicated to employees. If the changed expectations are temporary, that should be communicated as well.

Collecting and Reviewing Documents

Data collections can largely be accomplished remotely, particularly for server data. Using Office 365, for example, companies can perform remote collections themselves or provide administrative access to an outside firm or vendor. To

the extent a company would like to handle the collection itself while involving an outside vendor for support, it can use WebEx or screen shares for the vendor to shadow and assist with the collection.

Remote collection is more challenging when working with local drives and devices, but there are ways to accomplish both a full disk collection and directed collections. To copy local drives from workstations or laptops, companies can install remote access software on devices that allow information technology remote control when the computer is connected to the internet. Such applications can even be installed remotely if the IT systems are sophisticated. For devices like iPads or iPhones, a company may need to ask custodians to enable backup of their respective devices to the cloud. However, some sophisticated tools can force devices to back-up to the cloud on the back end.

Investigators also should assess whether a custodian retains hard copy materials. To the extent relevant material exists in this format, the custodian may be able to scan the documents for review. Without the ability to review documents in person or scan large quantities of data, investigative teams may need to rely on the custodian to transmit what is relevant. This reliance, of course, can lead to pitfalls and problems.

A custodian may store hard copy materials in an office building to which she no longer has access. Or there may be credibility concerns with a witness transmitting what she deems relevant. It is best practice to assess the existence of hard copy materials, but electronic collections are likely to be more complete and reliable than hard copy collections in the context of a remote investigation.

With respect to document review, the process is far simpler. Lawyers have long been accustomed to reviewing documents on web-based platforms. These review tools, along with a plethora of e-discovery analytic tools, allow review and analysis with ease from any remote location.

Conducting Interviews Remotely

Nothing can replace the value of an in-person interview, especially for key witnesses. But when in-person is not an option, telephonic or video interviews are a useful alternative. In order to make these interviews as efficient and streamlined as possible, consider the following best practices.

Scheduling and Logistics

First, work with the witness and other participants to schedule the interview at a mutually convenient time, keeping in mind the added obstacles witnesses may face with respect to privacy and childcare. It is important that the interview environment remain as private as possible for the witness, both to encourage dialogue and to protect legal privilege.

Second, schedule more time than you predict you need for the interview, to allow for additional explanation or discussion that may be required when you are not face-to-face.

Third, if you are working across time zones or countries, leverage support from local teams to assist with logistics and scheduling. Fourth, if there are potential language barriers, err on the side of having a translator on the call; language gaps may be more pervasive in telephonic interviews.

Setting Up Technology

Have all passwords and links set up and ready in advance of the interview start time. If needed, conduct a practice session to familiarize yourself with the technology. If there are any third parties participating, such as counsel for the audit committee or a witness's attorney, the investigator should consider using their own conference line or outside counsel's line, to ensure proper security and control. If appearing on video, the participant should also ensure that their background is professional. To the extent an office setting is not available, this can be accomplished in certain applications by blurring the background or using a virtual background.

Interacting With the Witness

It can be harder to establish a rapport and read a witness during remote interviews. To this end, video conferences may be preferable to teleconferences, as the technology allows the interviewer to pick up on non-verbal cues that may otherwise be lost. However, video conferences may also pose an increased risk of technical issues or distracting glitches. With either technology, the interviewer may need to encourage more complete verbal responses from the witness.

Notetaking and Recording

It is always best practice to staff an interview with more than one attorney or investigator, whether the interview is in-person, telephonic, or via videoconference. Having a colleague present, who takes careful and accurate notes, will serve to protect the company from any allegations of misrepresentation during the interview, such as claims that the *Upjohn* warning—in which corporate counsel advises that the company owns the legal privilege, rather than the employee—was not properly delivered. It also ensures an accurate factual record.

Even for companies working with leaner, reduced teams, having a notetaker is critical. Indeed, it may be even more important in this remote context, as the presence of a notetaker allows the interviewer to focus on establishing a rapport with the witness, rather than creating a distraction by notetaking.

It may be tempting to create an audio recording of the interview, particularly in one-party consent jurisdictions; however, this creates a greater risk that the recording will become discoverable. If there is concern that a witness might record the interview on their end, the interviewer should address the issue upfront, making clear that the witness is not permitted to record the interview and the company does not provide consent to a recording.

Reviewing Documents

Plan in advance of the interview how and when to show documents to the witness. One option is to send the documents to the witness via e-mail in advance of or during the interview, to review on his or her screen. Another option is to conduct the interview using a videoconferencing software that allows an investigator to share their screen. This latter option may be preferable to avoid letting the witness view the documents in advance of questions or have access to them after the interview concludes.

Investigative Team Communications

In a virtual world, it becomes even more important to maintain strong communication both in-house and with outside counsel. Regular team calls can ensure that everyone is aware of their respective responsibilities and can report their progress. Shareable, editable progress trackers listing clear responsibilities, updates, and deadlines also can promote accountability. In addition, with fewer in-person meetings and potentially more e-mail traffic and documents, it is of heightened importance to protect legal privilege by marking documents appropriately and including in-house or outside counsel on communications.

Investigation Reports

The final stage of an investigation is one that can be—and often is—handled remotely. The team must analyze the documents, interview statements, and other data to form conclusions about what occurred, why, and the legal risks it poses, if any. Depending on a company's preference and practices, the investigation report can come in various forms, which also can be accomplished virtually. Whether in writing, or as a telephonic or video presentation, the investigative team should present its conclusions to any necessary decision-makers. Once again, in so doing, the team must be cognizant to protect legal privilege.

Adapting to Circumstances

In an ideal investigation, the team would collect all potentially relevant documents and interview all current, former, and furloughed employees that have or may have pertinent information. But, especially in the current environment, companies may need to take prompt action without allowing the perfect to be the enemy of the good.

Consider the case of reported sexual misconduct via videoconference, or alleged procurement fraud related to the production of Covid-19-related products for the government. In such instances, among others, the company may need to act efficiently by streamlining or triaging the typical steps. Perhaps it collects documents on a rolling basis, starting with the sources that are most easily available to obtain remotely.

Or it may table a review of scanned, hard copy documents until after interviewing the key witnesses, in an effort to determine whether they are truly necessary. It may also decide to forego certain steps in the investigation manual to get to a faster result, such as by providing recommendations to an audit committee or management team via telephone conference rather than drafting a formal report.

New Opportunities

The new remote reality adds complexity and challenges to internal investigations. But it also offers up new opportunities. With increased use of technology—and a dash of creativity—internal reviews can remain efficient and effective. To the extent investigative activity does slow during the crisis, teams can turn their attention to the critical compliance efforts that often get pushed aside when other deadlines loom: updating policies and procedures, finalizing reports and memoranda to file, and drafting exemplars and training materials. As such, when business returns to business-as-usual, companies can be confident that their procedures never faltered—and, in fact, are stronger than before.