

# Anticipating COVID-19's Effect On Internal Investigations

By **Jack Sharman and Amber Hall** (March 26, 2020)

It is commonplace to observe that the COVID-19 pandemic will change law, business and life, but what will corporate internal investigations look like in a post-coronavirus world?

Predictions are perilous in a shifting landscape, but here are some points that compliance officers and white collar lawyers may want to look for when government regulation and enforcement shake off their own quarantine.

## Fragmentation and Opportunity

The country and its legal system slowed to a crawl and worked from home. "Zoom" turned from being a quaint verb into a primary pipeline for business interfaces. Schools, colleges and universities closed and sent students home to continue their studies online, in a matter of weeks retraining teachers and pupils and rebranding how we think of education.

One of potential outcomes of the zooming of American business life is a fragmentation and deracination of the corporate workforce unseen since the beginnings of the modern corporate form. Digital norms and online ethics are not as readily enforced as norms and ethics in the office suite, at the break room or even around the water cooler.

The taboos that compliance officers promulgate and white collar lawyers investigate may lose their punch with officers, managers or employees who, for all practical purposes, are working alone. One would expect new and wonderful platforms to spring up in an attempt to replicate the old structures, but they may fail. Their failure will lead to greater and greater opportunity for malfeasance, unethical conduct and criminal business offenses.

## Costs: the Haves, the Have-Nots and the No-Pays

Not only will there be greater opportunity for pitfalls, there will also be higher costs for those internal investigations that matter most to businesses and especially to publicly traded companies. On the other hand, more pedestrian internal investigations may experience a sharp drop in the price tag. And business clients will simply not pay for some things at all. Why is this so?

The fragmentation and deracination of so much of the corporate workforce will present not only greater opportunities for potential wrongdoing but also increased complexity and burden for internal investigators.

It is hard enough to conduct a sound internal investigation on a matter of any complexity where executives or employees have a physical, spatial relationship with each other and witness interviews or document collection can rest comfortably in old-fashioned tracks, even if newer and fancier electronic tools are deployed.

COVID-19 poses a paradox: Losing the ability to have personal face-to-face meetings may lead to a world where business colleagues (and internal investigators) will have a peek into



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personal lives in a way that has never happened before.

In the post-coronavirus world, even a relatively straightforward task — for example, identifying who is a witness or a custodian — will become more challenging.

What do we do, for example, with the employee's 15-year-old son who may have heard his mother working in the living room and offering up material nonpublic information to another family member? And the fact that we only know about that possible leak because we took it upon ourselves to dig not into the mother's records but into the son's TikTok account?

On the other hand, for relatively straightforward, garden-variety internal investigations — think of a low-sensitivity human-resources review, for example — the sudden omnipresence of off-site technologies may mean that such investigations become even more commoditized than they already are.

Eventually, savvy corporate clients will simply stop paying for much in-person interaction — again, unless the stakes are sufficiently high and the issues nuanced. Humans crave human contact, of course, and workers may rush back to the office when the pandemic ends. We will want to trade our Zoom meetings for in-person gatherings, but the former are less expensive.

Similarly, the cheaper price tag on an investigation may lead to a less thorough project. Among all types of practices, internal investigations and white collar defense depend on both a personal bedside manner and the ability to assess witnesses credibility in person. It can be challenging enough to have an executive or employee who is cooperating with the government or serving as a whistle blower. It is considerably more disconcerting to meet him or her in person for the first time at trial.

### **No Barriers Between Work and Home**

If the early 21st century retained any barriers between the workplace and the home, COVID-19 may have obliterated them. Employers, and especially those in large organizations, have realized the cost savings and flexibility offered by remote work. The coronavirus has forced managers and employees across industries to make into reality what was formerly a hope (or a fear): mass remote work and distance-learning.

To conduct a thorough and effective internal investigation, investigators will have to cross boundaries — digitally, certainly, but also sometimes physically, because data may be on home-affiliated networks and important testimony may be in the minds of family members, neighbors or third parties associated with the home (such as housekeepers, delivery persons and information technology vendors).

### **Privacy: Technology and Expectations**

Not only must the internal investigator consider fewer barriers between home and work, he or she will need to grapple with the differing landscape of privacy both in terms of technology and expectations. Remote is not just a newly popular term of personnel management. It can also mean distant and unlikely to occur, a circumstance in which employees may ironically expect more privacy rather than less.

Many difficult issues will have to be decided in a situation in which the company's position is that the employee has no privacy with regard to corporate materials and conduct, yet all of those materials and all of that conduct is considered by the employee to be part and parcel

of his or her home.

In addition, as technology evolves and becomes more affordable, employers and investigators can exploit —perhaps for good, perhaps for ill, perhaps for — the interstices of a subjects public and private life. If mass analysis of Instagram posts can be used to track persons exposed to the coronavirus, perhaps it can also track the trail of economic espionage or public corruption.

We long for COVID-19 to pass. Yet, as Albert Camus wrote in "The Plague": "The first thing that plague brought to our town was exile." Once the coronavirus exile is lifted, the internal-investigations practitioner will return to find a new and different landscape than the one we all knew before.

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