



DON'T PUT OFF CRISIS INVESTIGATIONS

By Bridget Blinn-Spears

Late on a recent Friday afternoon, my six-year-old son walked into my home office with Scotch tape across his mouth (to show me that he was planning to be quiet) and gave me a hug. Ignoring my insistent instruction to stay out of the office while I was on a work call, he was clearly visible on my computer screen as I interviewed a witness in an investigation for a client. Fortunately, the witness was also a parent working from home under imperfect circumstances because of the COVID-19 pandemic. She had shouted at her own son to close the door while he used the restroom earlier in the interview, and I had commiserated that I also had to remind my kids to close the door (and to flush and wash their hands).

CRISIS REQUIRES ACTION

Even in crisis, critical operations continue, and opportunities for legal and policy violations abound. Whistleblowers and employees subject to discrimination and harassment are particularly vulnerable as streamlined operations create fewer checks and balances on employment decisions. Changes in chains of supervision may expose employees to new relationships in stressful situations. Stress may reveal biases and lead to more overt discrimination and harassment opportunities. Additionally, issues with fraud and embezzlement are often uncovered when the responsible employees are unexpectedly out of the office.

Crisis brings out the best and worst in people. Unprecedented challenges like a global pandemic raise the stakes of personnel decisions, exacerbating power structures that may reveal significant vulnerabilities. Employees may also become confused about where to report issues as roles and personnel change. Wise employers will provide clear

channels for reporting and continue to prioritize prompt investigation of employee complaints and potential misconduct to avoid criticism in hindsight when the crisis has passed.

PRIORITIZING PROMPTNESS THROUGH TECHNOLOGY

Best practices ordinarily involve prompt, in-person interviews with key witnesses for most investigations. Social distancing requirements, like weather-related disasters that may disperse employees far from their usual work locations, can make in-person interviews much more challenging to accomplish. But, technology allows investigations to proceed without delay.

Video conferencing allows investigators to see witnesses in real time and make similar observations to those they make in person regarding facial expressions and body language, and screen-sharing technology can allow investigators and witnesses to examine documents and other evidence simultaneously. Some investigations can be conducted in whole or in part by phone conference, although this solution is less ideal because it provides far less nonverbal information to the investigator.

Investigators must also use care to use versions of technology with sufficient protection for privacy. They must also ask witnesses to find a location that protects confidentiality and avoids eavesdropping. Investigators must also be prepared to be flexible to allow witnesses to handle unavoidable issues like a doorbell ringing or a pet or child needing attention.

WEIGHING THE RISKS OF DELAY

Employers may be tempted to postpone investigations in light of a seemingly more pressing crisis, but this approach is shortsighted and could have serious long-term consequences. Violations of law or policy, which may seem more excusable during a crisis, will be judged more harshly in hindsight when the crisis has passed. Failure to timely address employee complaints can limit companies' access to defenses from some employee claims (such as Faragher-Ellerth defenses against sexual harassment claims or good faith defenses that depend on prompt action). Additionally, unlike weather-related disasters and other more common catastrophes, delay due to the pandemic could be indefinite. Time impedes investigations as memories fade and background documents become more challenging to identify and preserve. Perhaps more importantly, legal and policy violations can erode carefully-built company culture.

Ideally, companies will make decisions with their employees to ensure everyone is on the same page about the tradeoffs of proceeding with an investigation via video conference or phone interviews. If a decision is made to postpone an investigation, the reasons should be carefully documented and measures taken to preserve relevant evidence. Text messages are particularly vulnerable to loss due to automatic deletion, deletion by

phone owners to save storage, or loss when phones are upgraded. Emails can also be easily lost to automatic deletion. Over time, backups of phone and email storage are overwritten as well, so longer delays can lead to more information lost. Employee buy-in and documentation may mitigate some of the risks of delay, but companies that choose to proceed with appropriate technology adjustments avoid those risks.

KEYS FOR CRISIS INVESTIGATIONS

Companies should keep in mind the following keys as they assess how best to address investigation needs during a crisis:

- Ensure employees know how and where to raise concerns
- Use appropriate video technology
- Adjust procedures to protect confidentiality
- Take effective measures to preserve evidence
- Work with any complainants or whistleblowers to determine whether to proceed or delay

To avoid further interruptions during this remote working period, my family decided to install a lock on the office door and a noise machine to muffle the occasional jiggle of the door handle from little hands. We are all adjusting to this new work environment and what it means to work virtually. While we do that, more than ever, leaders can instill confidence in striving ahead and continuing to proactively manage concerns as they arise so that their organizations can rise above this challenge and achieve their missions.

NEXT CHALLENGE. NEXT LEVEL.
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Bridget Blinn-Spears is a recognized litigator who helps employers navigate the complexities and peculiarities of managing their unique workforce. Contact her at 919.678.7593, bblinn-spears@nexsen-pruet.com