

Risks associated with conducting Internal Investigations during the pandemic

23.10.2020 3 min read

Authors

Anna Carolina Malta Spilborghs

Related areas

Compliance, Investigations and Regulatory Enforcement

Topics

Compliance, Investigations and Regulatory Enforcement

Review **Anna Carolina Malta**

Spilborghs **João Bonvicino**

In addition to the tragic loss of human lives, the pandemic has had negative effects on internal corporate investigations, bringing with it new risks with the abrupt shift to a workspace 100% on-line or near that edge.

Traditionally some of the main phases of an Internal Investigation are conducted in loco/in person, such as the collection and preservation of electronic evidence (e.g. corporate emails) and the final investigative interviews before closing the report.

Computer forensic methods recommend that for investigative purposes electronic data be collected by a computational method known as “forensic imaging”, a type of collection that has to be made through the hardware of electronic devices (and thus in person) and that preserves a complete and exact image of the data. In investigations, of course, complete information is of paramount importance.

Various new technologies enable data to be collected from virtual environments. An important barrier is that it is still not known how authorities within the judicial system will react to and apply the use of such technologies and evidence extracted and collected solely online. The risk, then, is that electronic evidence collected remotely may be invalidated by the courts.

From a compliance perspective, therefore, it is important for investigators to establish a detailed protocol for the data collection process that protects the chain of custody, so that the procedure can be examined by an expert if it becomes necessary to confirm the integrity of the evidence.

Another important step in Internal Investigations that has undergone significant changes during the pandemic is investigative interviews with personnel. Questions around unauthorized online transmission of interviews and the fear that recorded interviews could be leaked without the company's knowledge have become points of concern, reflecting the current debate over data privacy around the world. In addition, people who are interviewed remotely, in their homes, may feel uncomfortable, at the very least, at being questioned in the course of a corporate investigation in their home environment, which could generate potential employment liabilities.

Reviewing interview protocols, and repeating legal warnings at the beginning and at the end of each interview are examples of additional protections that should be adopted. Private investigations in Brazil have clear limits that have to be observed. Reviewing Internal Investigation protocols and respecting the rules under Brazilian law intended to preserve privacy and private life of investigated employees have become even more critical.

Nowadays investigative interviews conducted in a way that does not meet the highest ethical standards are a risk for any Internal Investigation.

In a time of crisis it is prudent to redouble our attention, review our methods and reflect on the measures that underlie the conduct of Internal Investigations, as a way to mitigate or avoid risks. It is fundamental for legal departments and compliance divisions to act together to ensure that new practices are fully compatible with their organization's compliance rules, especially since it seems that remote work is here to stay, even post-pandemic.

This content is part of BMA Review 69. [Click here to access the other articles or read the full edition here.](#)

Would you like to have our content delivered directly to your inbox? **Sign up here.**

Photo: Shutterstock

› PROFESSIONALS

Professionals who combine legal insight and market perspective



Anna Carolina Malta Spilborgs