



# COVID-19: Conducting internal investigations in remote work settings

## Investigations Alert

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By: Gail Rodgers | Nancy Nguyen Sims | Mandy Chan-Lucero | Elizabeth Callahan

The ongoing coronavirus disease 2019 (COVID-19) pandemic poses unique challenges for companies that are conducting internal investigations or find themselves the subject of an investigation. Witness interviews, documents and data collection, and interactions with enforcement agencies have all been affected by stay-at-home orders. Despite these disruptions, companies can employ practical solutions to continue these activities and work around limitations posed by the government in response to COVID-19.

### 1. Witness interviews

Among the most fundamental concerns is how to conduct interviews remotely. With proper planning and the appropriate use of technology, videoconference solutions are a viable alternative in most situations. Companies are encouraged to keep the following practical considerations in mind when conducting interviews remotely:

- Consider which interviews need to be conducted immediately and which should be deferred to a later time when they can take place in person.
- Plan the logistics. Inform the witness in advance that the interview will be conducted by video. Conduct a trial run to ensure the witness can access the necessary hardware, understands how to use the videoconferencing software, and has an appropriately fast Internet connection
- Before the interview, establish an alternative means of communication in case of technological issues. Factors such as witness unavailability or impending deadlines may mean a later interview is not possible.
- Instruct the witness to find a private space for the interview. This is important not only to minimize distractions, but to preserve the attorney-client privilege. The privilege may be impacted if third parties, such as spouses, children or roommates, are in the same room or nearby and can overhear the interview. At the outset of the interview, interviewers should confirm that all participants are in a location that is private. During the interview, periodically ask the witness for confirmation that no one else has entered the room.
- Set ground rules for speaking during the interview, such as allowing for a brief pause after one person speaks before another jumps in. This is especially important when the interview is conducted through a translator.
- Prepare exhibits in advance. Be thoughtful about how to use documents during the interview. Current technology may permit in-interview sharing of documents, such as screen-sharing or electronic transmission during the interview, but careful planning is required. Alternatively, it may be more efficient to share documents in advance of the interview and, where appropriate, to password-protect such documents with the password to be conveyed upon commencement of the interview. Also, consider any applicable data privacy laws before transmitting certain types of documents, such as medical records or files containing personally identifiable information, and when using and sharing documents with a witness in another jurisdiction.
- Protect security and privacy by using unique participant IDs and passcodes to ensure there are no unexpected attendees. Set up a waiting room to monitor who is joining your meeting and when. Lock the meeting once it has started to prevent any further participants from joining.

Video interviews may not always be feasible. They may be useful for fact witnesses who are not alleged to have participated in any wrongdoing. But individuals may attempt to use the limitations of videoconferencing as an advantage. For example, an unscrupulous witness could feign technological issues as a tactic during an interview to avoid responding to a difficult question or be coached by someone off-screen. It also may be more difficult to assess a witness's credibility based on body language or other soft cues that would be available to an investigator in person. If a witness records an interview, there may be risks with respect to privilege and discoverability. Companies are encouraged to instruct witnesses not to do so, and to the extent possible, to implement technical solutions to prevent recording.

Ultimately, whether to proceed with a video interview will depend on the particular case. But regulators expect companies to continue identifying compliance concerns and responding to enforcement actions or inquiries, so companies are encouraged to continue to timely conduct investigations, including witness interviews, despite current limitations.

## 2. Collecting and reviewing documents and data

Although many electronic documents can now be collected remotely, restrictions on travel and access to corporate facilities and personnel may affect a company's ability to collect all relevant documents and data. We encourage consideration of the following:

- **Hard-copy documents.** Some companies still maintain certain documents in hard copy only, particularly in certain countries or industries or where the alleged wrongdoing dates back many years. If collecting hard-copy documents cannot be done safely, companies should carefully consider how best to secure the locations in which relevant physical evidence is located to prevent its loss or destruction until such time that the evidence may be safely and properly gathered. Companies are also encouraged to consider whether reissuance of document preservation notices to affected employees may be necessary and/or appropriate to ensure they remain aware of their ongoing obligations.
- **Devices and electronic data.** For electronic data existing only on laptop hard drives, mobile phones, tablets,

and other devices, recent advances in forensic data collection now permit “DIY” collections in certain situations, where the data custodian is sent a remote collection kit in the mail. Using Wi-Fi access, the custodians can merely plug in the device and call the vendor to grant them access. In other situations, companies can arrange for protocols for the collection and review of data while maintaining potentially crucial safeguards such as chain of custody, and segregation of an individual's purely personal/private information from relevant company data.

- **Other locally stored data.** Some companies use local network drives or other containment solutions that may only be accessible and exportable from the company's premises. Consider engaging someone locally to obtain and scan documents which can then be emailed or uploaded. If access to the premises is not possible, companies are urged to take appropriate steps to ensure that routine data deletion policies are suspended to prevent loss or destruction until collection can be completed. If possible, also consider taking an inventory of the folders and documents that are being preserved (e.g., by capturing screenshots of the network folders and their contents) to allow for later confirmation that no deletions were made during this time period.
- **Preservation.** Travel restrictions and stay-at-home orders may make it extremely difficult, if not impossible, to collect the relevant data; and companies are strongly encouraged to take steps to ensure that all relevant data is preserved so it can be collected and reviewed promptly after restrictions are lifted. Again, consider the timing and content of preservation notices to affected employees, including ways to preserve data in such circumstances if temporarily unable to image laptops and phones.

As with all investigations, companies are strongly encouraged to consider applicable data privacy laws, particularly with cross-border situations or employees residing outside of the US. In some jurisdictions, it may be necessary to obtain an employee's consent before collecting or reviewing data, and in other jurisdictions, there may be requirements on how collections may be handled or what can be collected.

### 3. Enforcement agency interactions

As the COVID-19 pandemic continues, companies are urged to assess practical limitations and delays that may arise in interactions with federal enforcement agencies. Federal agencies are taking steps to minimize face-to-face interactions.[1] Enforcement priorities are also shifting, as the US Department of Justice recently directed US Attorney's Offices to prioritize the “detection, investigation, and prosecution of all criminal conduct related to the current pandemic.” [2] Because enforcement actions are expected to continue during the COVID-19 pandemic, companies are encouraged to consider engaging in dialogue with agencies regarding practical capacity to respond to requests for documents and information, especially for information that is paper-based or offline.

For more information, please contact the authors, your DLA Piper relationship attorney, or any member of our White Collar group or Litigation and Employment groups.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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[1] See Memorandum for the Heads of Departments and Agencies, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19* (Mar. 17, 2020), available here.

[2] See Memorandum for All United States Attorneys, *COVID-19 – Department of Justice Priorities* (Mar. 16, 2020), available here.

## AUTHORS



**Gail Rodgers**  
Partner



New York | T: +1 212 335 4500  
gail.rodgers@dlapiper.com

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**Nancy Nguyen Sims**  
Of Counsel  
Los Angeles (Century City) | T: +1 310 595 3000  
nancy.sims@dlapiper.com

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**Mandy Chan-Lucero**  
Associate  
San Francisco | T: +1 415 836 2500  
mandy.chan@dlapiper.com

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**Elizabeth Callahan**  
Associate  
San Francisco | T: +1 415 836 2500  
elizabeth.callahan@dlapiper.com

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