Baker McKenzie.

Creating an Effective Remote Investigations Process

April 7, 2020



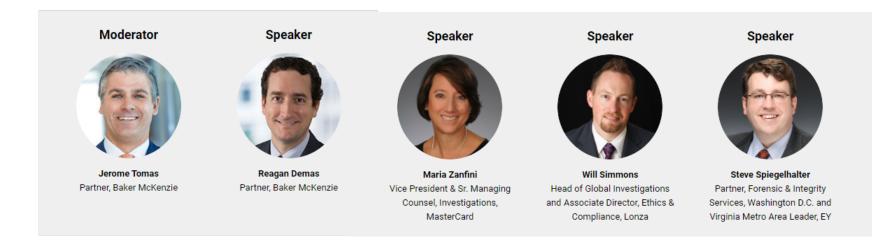








Welcome



- All attendee lines are muted
- Submit questions using the Chat feature in Zoom
- Email with recorded post webcast sent to registrants

Overview

1 Background

Remote investigations and legal implications

Practical recommendations

1

Background

Transitioning to remote investigations

Background

- COVID-19 public health concerns have caused many local, state and federal/national governments to impose significant restrictions on business and personal activity.
- Businesses continue to operate, albeit under much different circumstances. Remote corporate investigations are one facet of this "new reality."
- The advisability of conducting investigations remotely is driven by numerous considerations
 - Ongoing investigations need to be completed
 - Improper conduct may be ongoing
 - Risk losing evidence
 - Prompt investigation resolves uncertainty and allows for remediation
 - Law enforcement/regulatory expectations, including disclosure

Timeliness of investigations and modifications

COVID-19 impact caught many off-guard but...

- Remote investigation activities are routine for some companies
 - Lack of local resources
 - Financial constraints
 - Geographic spread
- More companies switching to remote investigations in current environment
 - Remote work
 - Travel restrictions
 - Social distancing requirements

Transitioning to remote investigations

Background

- Need to reassess/modify investigations workflows and systems because remote investigations present unique challenges
- "Normal" practices will need to be reconsidered
 - Issue: Travel to access records and image laptops may be restricted by law or company policy
 - Solution: Use of IT to access server data, use alternative sources of data
 - Issue: In-person interviews
 - Solution: Skype, Zoom, BlueJeans, FaceTime videoconferencing capabilities (but may be harder to assess witness credibility and ensure confidentiality)

Remote Investigations: Legal Implications

Modifications to regular processes

Legal implications

- Balance the need to maintain a functioning compliance program with the current realities
- Prepare for triaging of investigation work based on risk and be ready for an influx of complaints.
- Consider the following issues when conducting remote investigations
 - cybersecurity challenges
 - privilege issues
 - confidentiality and privacy issues
 - maintaining integrity of evidence preservation and collection
 - regulatory implications

Cybersecurity challenges

- Remote work increases cybersecurity challenges, some of which can cause disruptions and lead to subsequent litigation
- Increased risk of exposing confidential company information to hackers
 - Working from unsecured Wi-Fi and personal devices
 - Transmitting evidence containing sensitive company data via personal and unencrypted email accounts
- Insufficient security efforts may result in company data breaches or public dissemination of allegations, evidence, or findings

Privilege issues

- Transmittal of evidence or interviews through unsecured remote means risks destroying privilege and exposing company data to third parties (e.g., eavesdroppers)
 - Taking privileged materials and company computers offsite to prepare for interviews
 - Disclosure of privileged documentation or information while interviewing by telephone or video in unsecure locations (e.g. screen shares)
- If these interviews are conducted under privilege or if materials are protected by the attorney-client privilege, it is important that employees safeguard against disclosure to third parties that may result in waiving the privilege (may be more challenging to safeguard in remote investigations)

Confidentiality and privacy protections

- Risk of exposing confidential company information to third parties could threaten trade-secret protection
- Weakened security and confidentiality practices in remote investigations may increase the risk that such information could be required to be disclosed in litigation
- Increased risk that allegations of impropriety become public, which increases the likelihood of regulator disclosure
- Privacy concerns when sending devices outside the jurisdiction
- Real-time monitoring and privacy concerns
- Review information security and BYOD policies and guidelines, and remind employees of company expectations while conducting interviews

Integrity of evidence preservation and collection

- Emails can often be secured and collected remotely through servers, but other evidence can be harder to secure remotely
 - Hard copy documentation
 - Imaging of devices in particular, ephemeral messaging application usage
- Collection of accounting data for forensic review should be monitored to ensure integrity of data pull
- Non-simultaneous collection of evidence through discrete remote channels can tip off employees and result in spoliation of evidence
 - Coordination on timing and processes important

Discipline

- Promptly stop any improper conduct and take appropriate action against suspect employees
 - Garden leave, contract suspension
- Disciplining employees in digital world
 - Digital signatures
 - Regulations vary; consult employment counsel
- After investigation completed, upgrade compliance policies and guidelines
- Remote compliance training and communications (keep employees informed of outcomes of investigations/any policy changes)

Government Investigations

- US law enforcement and regulatory investigations remain active, but many other jurisdictions have slowed
- However, closures and remote work may require certain aspects of government investigations to be delayed or extended
 - In person-meetings, grand jury testimony, Meetings postponements
 - Request extensions, if needed, with explanations
- Highlight solutions e.g., relying on video and written depositions, testimony from alternative witnesses, using alternative remote discovery collection methods

Practical recommendations

Recommendations

- Primary focus should be on stopping improper conduct and preserving evidence
 - Remote data collection, but ensure preservation of devices through local contacts and means workable given local situation
- Ensure integrity of financial and account data pulls where done remotely or by company employees
 - Use screenshots ("virtual presence") when financial data is pulled
- Some jurisdictions already returning to more "normal" practices (e.g., China); rely on local counsel where possible
 - Constantly changing landscape as COVID-19 wave moves jurisdictionally

Recommendations (cont'd)

- If conducting remote interviews, avoid sharing sensitive or privileged materials electronically (consider screen share or alternative methods)
- Create clear protocols for phone and video interviews when they will be used, when they won't, and how they will proceed
 - Train investigative team on remote investigation processes
- If matter is before regulators, keep regulators updated on status and adjustments to typical protocols
- Consider appropriate safety measures where onsite work is necessary and possible, and follow all applicable guidance and rules on essential work and social distancing
- Stay in regular contact with your investigative team using technology
 - Weekly "virtual" meetings and status conferences

