

Tips for Conducting Effective Internal Investigations —Including “Zoom” Investigations — Part I

Employment Law, Internal Investigations / February 25, 2021 / Dennis P. Duffy

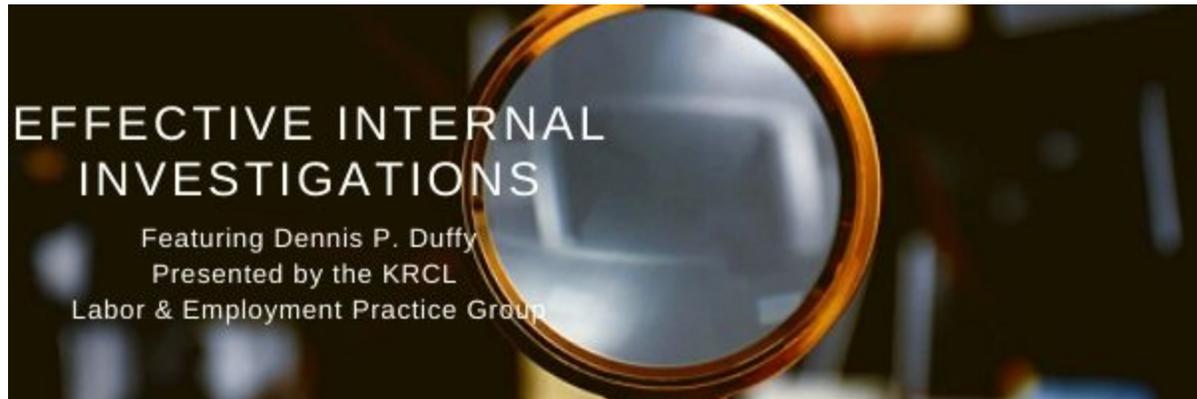
Despite COVID-19, the need to conduct internal investigations persists. Indeed, employers have seen an increase in whistleblower and similar complaints that require employer investigation. Due to COVID-related restrictions, an increasing number of employer investigations are being conducted remotely using Zoom, Skype, FaceTime and other communications technology. In this initial post, we offer a few tips for employer investigators to consider to ensure an effective and defensible investigation. In our upcoming webinar "Conducting Lawful and Effective Internal Investigations" on March 23, we will address in greater detail the challenges employers face in conducting lawful and effective internal investigations in the age of COVID.

- **Make a “front end” decision whether the investigation and report will be privileged.** To establish that an investigation is protected from disclosure under the attorney-client privilege, an employer must show that the investigation was conducted for the purpose of enabling the employer’s lawyers to provide legal advice to the employer. The privilege will not apply if the investigation is conducted without attorney involvement; even if an attorney is involved, the privilege will not apply if the lawyer is not acting in a capacity as attorney, or if it cannot be shown that the purpose of the investigation was to provide legal services to the employer-client. To increase the likelihood that a court will find that an investigation is protected by the privilege, the privileged purpose of the investigation should be included in the communications to the lawyer requesting the investigation, and the investigation report should similarly state the privileged purpose of the investigation. In addition, although the lawyer need not personally conduct the investigation to make it privileged, the lawyer (inside or outside counsel) should control the investigation, ensuring that communications regarding the investigation are limited to those within the privilege and that the report is provided to counsel.
- **Be careful with remote interviews.** You should become familiar with the technology you select for remote interviews (Zoom, FaceTime, etc.) and make sure that you can keep the interview confidential. Because you and the witness are not in the same room (and perhaps not in the same state), you should begin the interview by reminding the witness that the interview is considered confidential (or privileged) and confirm that the interviewee is in a room without others present. If the interview is conducted using a video-enabled device (such as Zoom), have the witness perform a 360-degree pan of the interview space to confirm that others are not present. Warn the witness if you plan to record the interview (in two-party consent states—such as California—you should get the consent of the witness before recording).
- **Take a “deposition strategy” in witness interviews: ask non-leading questions, listen to the answer, follow-up.** Use open-ended questions (who, what, when where, why, how) as opposed to leading question (i.e., questions that suggest the answer). For example, rather than asking, “Would you describe your supervisor as aggressive,” ask “How

would you describe your supervisor.” Be prepared to go “off-script” and ask follow-up questions. Never joke with the witness or make comments that suggest your impressions of the evidence, the witness or others.

- **Don't promise complete confidentiality.** Although you should state that the investigation will be confidential, information concerning the investigation will necessarily be shared with others within the company on a need-to-know basis and in some cases the investigation may be provided to government agencies or to the Court in litigation.

Part II of our "Tips for Conducting Effective Internal Investigations" will dive into documenting facts provided by the witness, organizing investigation notes, and writing the investigation report. You can click [here](#) to register for the March 23 webinar "Conducting Lawful and Effective Internal Investigations" presented by the Kane Russell Coleman Logan Labor & Employment Practice Group.



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