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ARTICLE

Virtual workplace investigations: The “next normal” - Postponing the investigation vs. proceeding by virtual means

This is the first part of a three-part series.

The COVID-19 pandemic has already impacted how we live and work in significant ways. As we move forward in the transition between the “new normal” and the “next normal”, we find ourselves re-evaluating many fundamental practices of our professional lives. Workplace investigations are certainly not being spared.

Since in-person meetings are either still prohibited or ill-advised in several jurisdictions, some investigators are considering remote investigations out of necessity.

However, many experts posit that this virtual shift may be here to stay. Indeed, employers, having already witnessed the precious resources saved by virtual investigations, may not be willing to fully revert back to traditional ways.

This publication is the first of a three-part series on virtual investigations. In Part II, we will discuss best practices related to investigating virtually, addressing topics such as confidentiality, the use of technology and investigator flexibility. In Part III, we will delve into the complexities of assessing witness credibility when meeting virtually.

Part I – Postponing the investigation vs. proceeding by virtual means

Whether choosing to conduct the investigation internally or delegating it to a qualified third party, the first critical decision for the employer is whether to proceed with a virtual investigation or to postpone the investigation until it can be conducted in person.

Depending on the jurisdiction, one can expect that face-to-face investigation interviews may soon be possible to resume. In any case, a pivotal question arises: how late is too late in the context of a workplace investigation? Employers should consider the following issues when making this decision.

Workplace stability

Once a workplace harassment complaint has been received and the employer determines that an investigation is warranted, the employer should immediately focus on the situation in the workplace.

Due to the pandemic, some (or all) of the parties to the investigation (i.e. the complainant, the respondent and the witnesses) may not be physically present in the workplace. While this can provide relief from otherwise tense workplace dynamics, the employer should be aware that the virtual workplace of employees working remotely can be just as conducive to generating conflict and stress.

An investigation into a serious complaint involving parties still working together or interacting (whether in person or by virtual means) should not be postponed, as it can escalate the conflict and the related stress on the parties involved.

Witness memory

The more time that goes by between the alleged events and a witness's interview on the matter, the less exhaustive and reliable their testimony will be. This factor alone will generally militate in favour of investigating as soon as possible, by all means necessary.

The investigation could be postponed to some extent, however, if there is a serious expectation that in-person meetings can soon resume and, most importantly, if specific considerations warrant live meetings.

Collecting evidence

Governments across the country have imposed confinement measures due to COVID-19, including shutting down workplaces. As a result, investigators may have limited access to the physical workplace and to any evidence that could be located there.

If the investigator suspects that the inaccessible evidence may be determinative, it may be advisable to postpone, at the very least, the respondent’s interview and the issuance of the report. If the allegations can be confirmed without this evidence or obtained by alternate means, however, this should not slow down the process. For instance, if the respondent admits to an alleged physical contact, postponing the investigation to gather video evidence available only in the workplace would not be warranted, as it would not be needed by the investigator to make their determination.

Employee perception

Postponing the investigation, even for a few weeks, can erode the complainant’s trust in the employer and the investigation process. It can give the impression that the employer is not treating the matter with the urgency the complainant feels it deserves.

In addition, if the complaint involves a significant number of employees (such as multiple complainants or respondents, or where the situation has not been kept confidential), this erosion of trust can become more generalized within the organization. In such a case, employees may feel that the process is too slow and that the employer does not take complaints seriously. Ultimately, this may lead employees to become less inclined to report harassment and to choose more litigious avenues instead of trusting the process.

Lastly, the passage of time may have the effect of exacerbating or confirming ruminations and subjective perceptions of the parties to the investigation. This may distort the information that will ultimately reach the investigator and/or be detrimental to an amicable resolution of the conflict in question. Thus, employee perception considerations typically favour a swift investigation.

Employee cooperation

Certain parties to the investigation may not currently be inclined to cooperate in the investigation process. For example, an employee who is on lay-off due to COVID-19 may not want to be involved. Employees generally have a duty to collaborate with an investigation. That said, the employer would be ill-advised to necessarily impose disciplinary action based on a temporarily laid-off employee's refusal to do so. Also, interviews with uncooperative witnesses often do not provide the investigator with the most reliable and complete information.

If important witnesses (or a significant proportion of them) risk being uncooperative for the above reasons, the investigator could wait and interview them when they are back on the employer's payroll. If this is not advisable, the investigation could be postponed. In certain circumstances, the employer may also consider recalling these employees to work temporarily, with pay, for the limited purpose of participating in the investigation.

Final word

In conclusion, when employers consider whether to postpone an investigation or to proceed virtually, they should keep in mind that their decisions may ultimately have to be justified before the relevant governmental or judicial authority seized with a harassment complaint. Indeed, any lack of diligence in the management of the complaint (either by postponing unnecessarily or by skipping crucial steps) may lead such authority to conclude that an employer did not meet its legal obligation to provide its employees with a harassment-free workplace.

Next in this series

- Part II – Best practices
- Part III – Are we effective lie detectors? (Credibility assessment in virtual settings)

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