

Coronavirus Information Hub: FAQ Investigations

General introduction

Due to the pandemic and the measures implemented in Switzerland and abroad (such as art. 10 para. 3 of the Swiss COVID-19 Ordinance Special Situation (status as of 18 January 2021) which provides for an obligation to work from home whenever possible), investigations are increasingly being conducted remotely. The current situation is likely to lead to a long-term shift to remote investigations in the future, as the already ongoing “work-from-anywhere” trend and flexible working has only been accelerated by the pandemic.

This development comes with advantage – but also challenges – when conducting investigations, some of which will be addressed in this questionnaire.

Should an upcoming investigation be postponed or conducted anyway?

As a general rule, it is not advisable to postpone an investigation, in particular when they are triggered by a whistleblower report. Not investigating a misconduct or anything similar could be perceived as ignoring the matter and may result in an unwanted escalation.

Furthermore, taking immediate action may be required if there is a risk that important evidence will deteriorate, be destroyed or lost. The same applies if there is an obligation to comply with certain specific legal or regulatory provisions/standards.

A postponement of the entire investigation (or a part thereof) should only be made in specific cases, for example where it is simply not possible to carry out certain investigative steps remotely.

Which areas of an investigation are usually particularly affected by being conducted remotely?

Having to conduct an investigation remotely affects most of its usual steps. This applies in particular to data gathering and preservation (especially if not all the data is available electronically) as well as the conducting of interviews which are usually done in-person.

On the other hand, the reviewing of data and the drafting of reports are usually less affected (although specific issues may arise there as well, cf. below) given that these steps were generally carried out remotely already prior to the changes that came with the pandemic.

Is there a potential need for adaptation in the area of investigations within a company, regardless of whether an investigation is currently being conducted?

If there are specific policies and process protocols for investigations, it is advisable to amend these with explanations of how to carry out an investigation remotely and to train the responsible employees.

Data preservation, collection and review

Which are potential challenges when gathering and preserving and how can I meet them?

Remote working can present challenges for data gathering and preservation while conducting an investigation, in particular if the data is not held at the workplace but at various locations, sometimes in different jurisdiction. As a general rule, and in particular in cross-border investigations, it is important to seek legal advice on which data can be collected and how it can be collected (in particular in view of the local employment law and data privacy legislation).

Collecting and preserving physical data: physical digital devices and hard copy documents are usually more difficult to collect and preserve without access to the premises where the data is located. If the data is only available in physical form, the co-operation with a person on site (e.g. the workplace) will likely be necessary to provide physical or electronic copies to the investigators. Where physical devices and documents cannot currently be collected and processed but remain in the workplace, it may be possible to arrange to secure these temporarily, for example by locking them away.

Collecting data from personal devices: With everyone working from home, the number of employees carrying out work on personal devices has increased. In addition to that and unrelated to the pandemic, many companies have implemented “Bring your Own Device” rules which are likely to raise additional and complex data protection issues, in particular due to the increasing difficulty to distinguish work from personal data.

Which are potential challenges when reviewing data and how can I meet them?

Remote data reviews were not uncommon prior to the pandemic but have certainly increased in importance within the last few months.

In order to be reviewed remotely, the relevant data either has to be transferred from its location to the reviewer or the reviewer requires to have remote access to the system where the data is stored. Both options involve security and confidentiality/privacy risks which have to be taken into consideration. Security measures and clear reviewing guidelines have to be implemented to ensure that the relevant data is only accessible to the reviewers and to avoid that the data somehow gets compromised. Data should therefore be encrypted and only provided by secure email or via secured portals.

Another aspect that needs to be taken into consideration is the location in which the data is reviewed. Due to data privacy or other restrictions, certain data may not be reviewed in other jurisdictions outside of Switzerland.

Before transferring data abroad or granting access to a reviewer located abroad (or before processing data stored abroad) it is therefore advisable to seek legal advice from local counsel in order to assess potential legal risks.

Interviews

Should I even conduct interviews remotely?

In-person interviews have many benefits and often provide more information than the interviewee's statements only: When sitting in front of the interviewee, the interviewer will also be able to observe facial expression, gestures, feelings and other non-verbal aspects that are important to understand statements and put them into context. Sometimes, the non-verbal aspects (as well as the behavior and statements of the interviewee prior and after the interview) are even crucial for the success of the investigation.

These important factors tend to be overlooked or are sometimes not perceived at all when an investigation is conducted remotely, and the interview carried out over the phone. Where an in-person meeting is not possible interviews should therefore, whenever possible, be conducted by video in order to get as close as possible to the an in-person interview situation.

Which are the potential challenges when conducting interviews remotely and how can I meet them?

When conducting remote interviews, the interviewer faces many challenges which mostly are attributable to him having less control over a number of factors he would usually have control over if the interview was carried out in person:

Technical prerequisites: Before the pandemic, video communication was sometimes still challenging to set up, as many companies or individuals were not properly equipped. This has however significantly improved in the last months with almost everyone having access to and communicating using video conferencing systems. When using these video conferencing systems or phone lines, one has to make sure that the line is secure and properly working. It is always advisable to test the systems in order to make sure that the interview does not get disturbed or interrupted due to technical problems that could have been anticipated.

Location and attendees: In in-person interviews, the interviewer usually chooses the location and controls who attends the interview. This is different in remote interviews: the interviewee decides where he takes a phone or video call and the interviewer can never be entirely sure that the interviewee is there by himself. In order to prevent any kind distraction or interference, steps should be undertaken to make sure the interviewee is in a quiet and private place. Furthermore, at the start of the interview, the interviewee should be asked to confirm that he is attending the interview alone, that there is no one else in the room and that he is not recording the interview (even though the interviewer always has to consider the possibility that the interview is recorded secretly).

Communication: As non-verbal aspects and signals cannot be perceived through the phone and are less clear in video conference interviews, communication needs to be verbal and clear. Nodding for example needs to be replaced with a clear "yes" or "I confirm". Furthermore, as it is more difficult to build eye contact, the interviewer needs to be clear about who he is talking too. In general, speaking slowly is advisable in order to make sure that interviewee understands and follows the questions and statements of the interviewer even if the internet or phone connection is unstable.

Showing documents: If the interviewer needs to refer to documents when questioning the interviewee, remote interviews can be challenging. In a video conference, documents can be shown by sharing the screen. Another option which also works for interviews over the phone is to provide

the relevant documents to the interviewee in advance (for example via secured portal or email). In that case the documents have to be numbered clearly in order to allow a clear reference and avoid misunderstandings. In both cases the control over the documents is more likely to be lost: the interviewee may take pictures or print screens from the documents shown during the interview or may make copies in case the documents are provided in advance. Also, it may be in the interest of the investigation/interviewer from a strategic point of view not to disclose all the documents to the interviewee at the beginning or prior to the interview.

Recordings: Regardless of whether the interview is conducted in person or remotely, it may appear helpful to the interviewer to record the interview. When deciding whether to do so, one has to consider carefully the advantages and disadvantages of such recordings (potential reluctance to share certain issues on tape, need to transcribe the recording later, loss of details when using written notes only, etc.). In addition, one should consider whether the recording will be discoverable and whether and how consent for such recording needs to be obtained. Especially in cross-border investigation, it is therefore advisable to seek legal advice from local counsel in order to identify potential legal restrictions. From a Swiss law perspective, the interviewee always has to authorize/give his consent for the recording prior to the interview.

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Walder Wyss is committed to supporting our clients through the challenges the pandemic presents. We will be publishing regular insights on this Information Hub.

Last amended: 11 March 2021