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Compliance Programs May Need 'Crisis Proofing,' Attorneys Say

By Nina Youngstrom

When attorney Brian Burke helped a company with a recent investigation, he saw some of the ripple effects of remote working on a compliance program. Because the company had shifted to 100% teleworking when the COVID-19 pandemic hit, “we had to pivot to remote interviews.” During an interview, Burke noticed the employee paused before answering questions. “We could hear whispering offscreen,” he said.

Burke realized the employee’s partner was in the room supplying answers. “She was sitting next to him off camera. It wasn’t even hard to figure out two people were answering.” The partner, who wasn’t employed by the company, obviously shouldn’t have been in the room. “If it was two years ago, this wouldn’t have happened. This is now reality.”

That was a vivid reminder of the risks of remote working. “Nothing is as good as being in the same room with the person,” Burke said. But assuming some remote interviews are inevitable, “you have to do them as effectively as possible.” He recommended preparing a protocol in advance “so you are drawing on a protocol rather than drawing up a protocol in the middle of a pandemic or other crisis.”

Mitigating the risks of remote working is one of the ways that compliance officers should think about “crisis proofing” their compliance programs, according to Burke and attorney Cáitín McKiernan, with Shearman & Sterling.^[1] “The focus has been on health and safety rightfully, but pandemics, like any crisis, have an impact on corporate compliance programs as well,” he noted. They’re referring to crisis proofing for micro-crises a company might encounter (e.g., employee protest, product recall, breach, bribery/fraud case, sexual harassment scandal), and macro-crises that affect an entire industry, geography or population (e.g., natural disaster, pandemic).

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