

## Campus Closed, Case Closed? Not So Fast.

While many colleges and universities shift to online instruction to prevent the community spread of COVID-19, administrators must consider how their institutions will handle investigations during this time. Institutions face the challenge of ensuring substantial compliance with governing law and internal policy in a new environment, where key stakeholders practice social distancing, may reside in different times zones, and may have different levels of access to technology.

This situation is unprecedented, and there is no one-size-fits-all solution. However, institutions can and should develop a plan for how to handle investigations during the pandemic. The following framework will help you identify key considerations to determine what approach will work best for your institution during this challenging time.

### **1. Determine which policies require investigations**

The first step is identifying all the policies within your institution that currently call for investigations. These could include human resources policies prohibiting discrimination and harassment, workplace violence policies, occupational health and safety policies, policies governing student conduct and residence life, policies specific to Title IX compliance, research misconduct inquiry processes, and others.

### **2. Create an index of open investigations and determine responsible parties and current practice**

Create an index of open investigations based on the policies you've identified. Determine which office or department is responsible for each investigation and whether they have adopted procedures for how investigations are customarily performed. If there are specific individuals tasked with conducting investigations under the policies, consult with them to determine how they generally conduct investigations, particularly if there are no written procedures.

### **3. Are there any interim measures, deadlines, or notice provisions that apply to open investigations? If so, how will you handle them?**

Interim measures (like no-contact orders), deadlines for investigations, and notice provisions will apply during this time, but the manner in which they apply might change. Changes should be made across the board to safeguard against disparate treatment claims among interested parties.

- For example, students involved in a pending Title IX case might need instruction on how a no-contact order might apply in the online learning environment. Institutions should consider an appropriate balance that safeguards students' rights to avail themselves of the benefits of online learning without committing the institution to widespread monitoring of social media platforms (a commitment that may well prove impossible to fulfill).
- Filing deadlines might stay the same or they might require extension based on the amount of disruption an institution has experienced. The manner of filing might need to be adjusted to allow for online or email submission.
- Notices to interested parties might be distributed via email or text message rather than via campus mail.

#### 4. Consider what “substantial compliance” means for your institution

In considering what substantial compliance means for your institution, you will need to balance the importance of timeliness and reaching closure by concluding investigations with your ability to acquire the “best evidence” (i.e., in person interviews). Many institutions already use technology such as interviews by phone or video for interviews when an individual is off campus or otherwise unavailable for a protracted period of time. It can also be helpful to consider what administrative agencies are doing in your locality. In New York State, for example the State Division of Human Rights and EEOC are holding hearings by telephone.

In light of the concepts of fairness and process likely embodied in your internal processes your institution should consider how the rigor of the modified process you implement coincides with the rights at stake. For example, a student or employee facing dismissal from an institution has more to lose than a student who might receive a nominal fine for making a mess in the residence hall or an employee who might be written up for sloppy performance. In lower stakes cases, written statements and phone interviews would usually suffice. However, in high stakes cases, institutions should exercise their best efforts to utilize technology to address the due process concerns that may arise under law, policy, or collective bargaining agreement. In any event, it is important to move forward with investigations, insofar as possible, using the technology and other resources available at your institution.

If you do not already have appeal processes in place, consider adopting a process to address procedural issues in this interim period. An internal process allows an institution to explain why investigators adopted certain techniques during the pandemic, showing that the decisions were not arbitrary or capricious, and it may help your institution avoid or mitigate the expense of defending well-reasoned actions in external forums.

Finally, you may wish to consider the impact that online learning may have on sanctions imposed during this period. For example, a student who receives a semester-long suspension during a period when no one is living on campus and co-curricular activities are canceled has arguably received a less severe sanction than a student whose suspension occurred during a time when housing, campus activities, and athletic departments were fully functional. Consider the reason for sanctions imposed, the types of sanctions imposed for similar infractions at your institution, and how changes in the delivery of instruction and campus activities might inform your institution’s view of fairness and equity in this context.

#### 5. How will you use technology to ensure substantial compliance?

Your IT department will play a key role in developing a compliance plan for investigations during the pandemic. With respect to each policy, consider the options available to you and prioritize them. Understand that some staff and students might not have access to high speed internet or computers at home, so it will be important to have some flexibility and more than one option for communication with complainants, respondents, and witnesses. Your institutional approach to substantial compliance will inform what constitutes acceptable methods of evidence gathering for different types of investigations.

#### 6. Communicate the Plan to Your Community

Once you have developed a plan, consider informing your community about how the institution will approach these matters during the pandemic. Frame your compliance efforts in the context of your institutional values: equal access to learning opportunities, commitment to research integrity, safety in the workplace, etc. Explain that the policies still apply, but compliance will look somewhat different, and then explain the differences. Ensure that stakeholders know where to file complaints during the pandemic, and that they understand that their obligation to cooperate with institutional investigations remains unchanged. Reiterate your institution’s commitment to fair treatment and equity in the application

of these policies during this difficult time. This can help manage expectations and reassure individuals that they are not being singled out for different treatment.

Please contact [Sarah Luke](#), or any [attorney](#) in the [Higher Education Practice Group](#), or your primary contact at Bond if you would like assistance in reviewing your investigation policies and procedures, and ensuring substantial compliance during the COVID-19 pandemic

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