

There's No Leaving It at the Office: Workplace Harassment When Working from Home

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March 11, 2021 marks one year since the World Health Organization declared the coronavirus outbreak a pandemic, and for many employees it also marks one year of working from home. According to Upwork's "Future of the Workforce Pulse Report," 26.7 percent of Americans are expected to be working remotely through 2021, and by 2025 more than 36 million will be doing so – an 87 percent increase from pre-pandemic levels.[1]

Even though record numbers of employees are working from home, the potential for workplace harassment remains the same. With more employees using electronic forms of communication such as e-mail, internal instant messaging systems, and video conferences, and the more relaxed environment of working from home, this combination presents new challenges for employers in ensuring that their workplace is free from harassment and discrimination. Anti-harassment training, as well as establishing and distributing an anti-harassment policy, are the first steps in combating against such unlawful conduct.

The importance of enforcing anti-harassment policies and conducting training is reflected in two U.S. Supreme Court decisions: *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. Through *Faragher* and *Ellerth*, the Court established that when a supervisor's sexual harassment results in a tangible employment action, such as termination or demotion, for example, the employer may be automatically liable. However, if no such action is taken, the employer may avail itself of an affirmative defense. In that case, an employer may take advantage of the *Faragher-Ellerth* defense if 1) the employer exercised reasonable care to prevent and promptly correct the conduct; and 2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Through anti-harassment training and enforcement of anti-harassment

policies, an employer may show that it exercised the requisite reasonable care.

Working remotely, however, inhibits an employer's ability to conduct live, face-to-face anti-harassment training for employees. With this in mind, employers can conduct virtual training sessions and still follow the Equal Employment Opportunity Commission's guidance on making employee training most effective in preventing and addressing harassment. The EEOC recommends that training should be provided in a clear, easy-to-understand style and format; tailored to the specific workplace and workforce; and designed to include active engagement by participants, among other things. It should include:

- Descriptions of prohibited conduct, as well as possible consequences for engaging in such harassing behavior;
- Explanations of the complaint process;
- Assurance that employees who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation;
- Opportunities to ask questions; and
- Contact information for the individual and/or department responsible for addressing employees' harassment questions, concerns, and complaints.

By conducting engaging and informative training, employers may protect against harassment in a virtual and remote working world. If you would like more information on this or any related matter, please contact the Nexsen Pruet Employment & Labor Law team.

[1] Press Release, Upwork, Upwork Study Finds 22% of American Workforce Will Be Remote by 2025 (December 15, 2020), <https://www.upwork.com/press/releases/upwork-study-finds-22-of-american-workforce-will-be-remote-by-2025>.