

BLURRED LINES: TITLE VII COMPLIANCE IN THE REMOTE ERA



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The remote workforce is expanding. Many businesses have been finding ways to capitalize upon technological advancements - even before the COVID-19 crisis made them necessary. It now appears clear that the future holds an inevitable shift towards a less centralized workplace.

That transition has serious impacts upon Title VII compliance for employers. Why? Let's take a look.

I. Title VII

Title VII of the Civil Rights Act of 1964 gives employees a lot of protections. One of those protections creates a shield against prohibited discrimination. That means employers and supervisors cannot engage in discrimination based on a protected characteristic such as race, religion, sex, or national origin. While these rules seem intuitive, compliance requires more than just common decency.

The protection against discrimination also includes a bar against harassment. That means employers can find themselves in deep trouble if they allow employees to endure harassment based on one of the protected characteristics mentioned above.

II. Basic Harassment Lawsuits

Let's focus on the anti-harassment protections for a second. It might be tempting to think that anti-harassment policies and procedures will be less important if employees spend more time working remotely. Should employers really worry about illegal harassment within the workforce even when employees are physically distanced from one another? Absolutely!

Anxiety about employee harassment might seem counterintuitive in a work-from-home workforce. Yet the remote workforce may actually increase the odds of employers running into Title VII issues.

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Why? Well, as we discussed above, employers can be sued for violating Title VII by engaging in or allowing harassment. When employees accuse their employers of prohibited harassment, they often claim that a “hostile workplace” has developed.

To allow a hostile workplace claim, courts usually require the employee be able to prove that: 1) he or she belongs to a protected group, 2) he or she was subject to unwelcome harassment, 3) the harassment was based upon a protected characteristic, 4) the harassment was severe or pervasive enough to alter the terms and conditions of employment, and 5) a basis exists for holding the employer liable. *See, e.g., Trask v. Sec’y, Dep’t of Veterans Affairs*, 822 F.3d 1179, 1195 (11th Cir. 2016).

The purpose of the fourth element is to ensure that a claim will only survive if an employee can show that the harassment complained of was “severe or perverse” enough “to alter [the] employee’s terms or conditions of employment.” *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999).

But how do courts determine when enough is enough? Do they judge from the employee’s perspective, or do they look at the evidence objectively? Well, the answer is both. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)). The employee has to show that he or she perceived the conduct to be abusive and that a reasonable person would agree. *See Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002).

III. Harassment Lawsuits in the Remote Workforce

An issue with working remotely is the inevitable blurring of the boundary between employees’ personal and professional lives. Working from home is much different than working in the office. In the remote workforce, employees are free to use couches and kitchen tables as their office. Dress codes are relaxed. Children may be present. Pets become office mates, and spouses are often within earshot of one another.

These blurred lines seem innocent enough, but they are going to be an issue for employers defending themselves against Title VII harassment lawsuits. The reason? The subjective nature of hostile workplace claims.

Hostile workplace claims are incredibly fact intensive. Liability often comes down to the circumstances. An employee suing for harassment will inevitably have to specify what conduct he or she found to be abusive. The circumstances in which that conduct occurs are what dictate whether the court will agree with the employee or not. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1273-74 (11th Cir. 1999).

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So, if circumstances are king, an employee working from home may have an easier time establishing that they experienced a hostile workplace. Courts are somewhat forgiving to supervisors who make isolated, ill-advised statements. Yet that goodwill seems much less likely if the same ill-advised comment is made to an employee working in the sanctuary of their own home. It seems even less likely if the comment is heard by a member of the employee's family.

Stray remarks during video conferences and phone calls are not the only concern. The remote workforce also has a higher reliance upon written electronic correspondence. Emails and instant messages appear to be the communications backbone of remote offices. Of course, the issue with written communications is the loss of context. Miscommunications are easy in written correspondence because it is difficult to gauge the tone with which the message was communicated. Since circumstances and context are key in hostile workplace suits, this loss of context could prove useful to an employee accusing his or her employer of a Title VII violation.

IV. Title VII

Fortunately, there are plenty of steps employers can take to make sure they comply with Title VII. Remote workforces will create new compliance challenges for employers. The best strategy for meeting these new challenges is to ensure that all Title VII policies have been modernized. Policies need to be reviewed to ensure that they incorporate legal developments and guidance issued by relevant authorities.

The importance of regularly updated, well-crafted policies cannot be overstated. Those policies, however, are essentially useless if managers and supervisors do not receive training. A good training regimen will teach employees about Title VII requirements and how to identify budding compliance issues. High-quality training programs will also inform employees about the employer's policies and how to effectively utilize the protocols outlined in those policies to address potential Title VII issues in an efficient manner.

Taking these steps can provide important legal advantages when Title VII investigations and lawsuits arise. They can also help the employer create a better, more professional workforce - and that has value no matter what changes workforce experiences.

COVID-19 Task Force

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