

When the hostile workplace is your home office

Experts theorize that remote colleagues lack a personal connection to each other that makes them more willing to engage in harmful behavior, often evidenced in electronic communications

By Jacqueline Crispino and William Jhaveri-Weeks

Remote work is now a permanent part of our economy, fundamentally changing the nature of workplace interactions and causing employment law to evolve accordingly. Companies now have employees who work "side-by-side" with each other every day despite being located all over the world, as opposed to working together in the same building. Recent studies confirm that high percentages of employees work remotely nationwide, and the numbers are higher in the tech-focused Bay Area.

Perhaps surprisingly, studies also show that harassment increases with the shift to remote work. This shift raises new issues for hostile work environment claims under the Fair Employment and Housing Act, as well as questions about which state's laws govern when the employees involved are in different states.

Evidence of a hostile work environment in remote spaces

Although unlawful hostility does not cease when co-worker interactions shift to a remote basis, its manner of transmission does. Biased jokes or comments that previously were made in person at the office are now transmitted on Zoom or via Slack or other chat functions.

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Sexually harassing physical contact may no longer be possible, but electronic communications create new forms of sexual harassment. (See, e.g., *Carranza v. City of Los Angeles* (2025) 111 Cal.App.5th 388, 403 [holding that the electronic circulation of a nude photo intended to depict plaintiff constituted harassment].) Harassment may occur on work or non-work platforms, including personal social media accounts. The website "Blind," which provides a forum for employees to communicate with each other about their place of employment anonymously, provides a fertile ground for harassers to make hostile comments without revealing their identity. Other new "electronic" manifestations of hostility include exclusion of employees from virtual meetings or group chat threads, hostile behavior conveyed over video chat, and ignoring or canceling virtual meeting invites.

This change impacts where and how the evidence of harassment can be found. On the one hand, explicitly biased comments are more frequently captured in writing or on recorded video calls, making them easier to prove than in the past. On the other hand, challenges include sifting through huge amounts of electronically stored information, attempting to discover communications on personal, non-work devices or platforms, dealing with "anonymous" comments, and determining whether video calls were recorded with consent (which may impact admissibility of the evidence or even give rise to counterclaims for unauthorized recording, depending on where the participants were located).

Increased incidences of harassment in remote spaces

A recent study found that the shift to remote work resulted in an increase in harassment on the basis of gender, age, and race for a significant percentage of responders. (*Remote work since COVID-19 is exacerbating harm*, Project Include (March 2021), https://projectinclude.org/assets/pdf/Project-Include-Harassment-Report-0321-F3.pdf.)

The EEOC has hypothesized that the decentralized nature of remote work may cause harassers to feel less accountability. "Project Include" co-founder Ellen Pao has theorized that remote colleagues lack a personal connection to each other that makes them more willing to engage in harmful behavior. In addition, the fact that employees in California are now interacting daily with co-workers in other states or countries means that some employees are playing by a different set of cultural rules under which harassing behavior may be more common or accepted.

The legal basis for a hostile work environment

The test for a hostile work environment is the same, regardless of whether the conduct occurs in the physical office or remotely. Under the California Fair Employment and Housing Act (FEHA), it is unlawful for an employer to harass an employee "because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decision making, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person." (See Gov. Code, § 12940, subd. (j).) To prevail on a FEHA harassment claim, an employee must demonstrate that the conduct complained of was severe or pervasive enough to alter the conditions of employment and create a subjectively and objectively hostile work environment. (*Bailey v. San Francisco Dist. Atty's Office* (2024) 16 Cal.5th 611, 628.) This "is not, and by its nature cannot be, a mathematically precise test." (*Ibid.* [holding that the one-time use of a racial slur by a co-worker may create a hostile work environment].) The California Legislature updated FEHA in 2019 to state that harassment claims depend on the "totality of the circumstances," and are rarely appropriate for disposition on summary judgment. (Gov. Code § 12923.) The test under federal law (Title VII) is similar.

Activity on private social media accounts and ChatGPT

In a remote context, the boundaries between work and personal electronic communications can blur. For example, in *Okonowsky v. Garland* (9th Cir. 2024) 109 F.4th 1166, the plaintiff's co-worker created a personal Instagram page related to his experiences at work, which was "followed" by employees of the defendant as well as non-employees. The page contained allegedly harassing comments about female co-workers, including posts that targeted the plaintiff. The plaintiff learned of the page and felt unsafe at work. The Ninth Circuit held that even "wholly offsite" conduct is relevant to liability if it "affects the employee's working environment." On the other hand, in *Attala v. Rite Aid* (2023) 89 Cal.App.5th 294, when a supervisor had a pre-existing friendship with a co-worker and sent her explicit messages, the court held that no harassment occurred because the totality of the circumstances made it clear that the messages were part of the separate personal relationship between the two individuals, and were not connected to the workplace or their roles at work. Separating the personal from the work-related can be complex.

In the recent case *Kruitbosch v. Bakersfield Recovery Services, Inc.*, __ Cal.App.5th __, 2025 Cal.App. LEXIS 569, 2025 WL 2600238 (Sept. 8, 2025), the Court of Appeal provided guidance about when the employer is liable for co-worker harassment that takes place off-premises and through non-work instrumentalities. Applying a "totality of circumstances" test, the court (perhaps surprisingly) found that truly egregious sexual propositioning by a non-supervisory co-worker outside of work did not give rise to a claim for sexual harassment; however, HR's casual response to the plaintiff's complaint about the conduct

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(including a social media post by the HR employee that seemed to accuse the plaintiff of "whining"), created a triable issue of fact as to the existence of a hostile workplace.

Because harassment is only actionable if it is "because of" the victim's membership in a protected category, behavior by the alleged harasser on personal social media may provide strong evidence that the harassment was "because of" such membership. For example, as ChatGPT becomes more widespread, it will be an important area for discovery – alleged harassers' conversations with ChatGPT and other AI large-language models could provide voluminous evidence of the harasser's unvarnished, biased views. Similarly, a "like" of a biased post on LinkedIn may provide evidence of the harasser's motivation in his or her treatment of the plaintiff.

Which state's laws apply

Sometimes the victim is located in California and the harassers are elsewhere, and sometimes the victim is located elsewhere but wants to invoke FEHA. This can raise issues about the extraterritorial reach of FEHA.

When a remote employee is based in California, FEHA generally protects that employee, even if the employer and harassers are elsewhere. Even if the employer includes a choice-of-law provision in the employment agreement that purports to select another state's laws, such provisions are voidable at the employee's option unless the employee actually negotiated the agreement with the advice of a lawyer. (Labor Code, § 925.)

When a plaintiff employee is based in another state, FEHA applies only if there is a sufficient connection to California, such as the wrongful conduct having been performed or approved by individuals in California. (See *Campbell v. Arco Marine, Inc.* (1996) 42 Cal.App.4th 1850.) The mere fact that the employer is headquartered in California is not enough on its own. This suggests that FEHA likely applies if one or more harassers are located in California, company decision-makers who played a role in tolerating or ratifying the harassment are located in California, or the company has agreed by contract (i.e., in a choice-of-law provision) that California law governs the employment relationship (although the wording of the provision will be important). Courts often grapple with the reach of FEHA for out-of-state plaintiffs. (See, e.g., *Hill v. Workday, Inc.*, 773 F.Supp. 3d 779, 794 (N.D. Cal. 2025) [plaintiff in Maryland failed to allege specific wrongful actions by employees located in California, so FEHA did not apply].) In cases involving wrongful termination, FEHA likely applies if the decision-maker was located in California. Whether FEHA applies can make a large difference, especially because of damage caps that apply under Title VII.

Final thoughts

To any employee who has experienced harassment while working remotely, there is no doubt that a home office can be an extremely harmful and damaging environment. Plaintiffs' attorneys are on the forefront of ensuring that FEHA's protections apply with full force to unlawful harassment of remote workers.



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