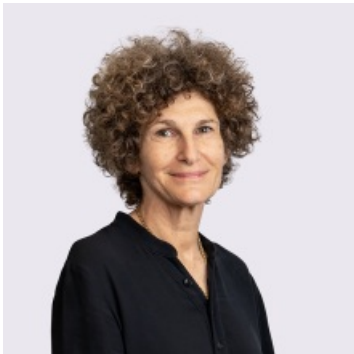


# The Virtual Workplace: Keeping it Clean (Literally and Figuratively)

By Felice B. Ekelman & Stephanie J. Peet

November 19, 2020

## Meet the Authors



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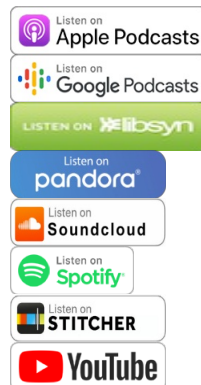
Workplace Training

## Details

November 19, 2020

The virtual workplace has blurred the line between our personal and professional spaces — but the behavior that constitutes harassment in the workplace remains the same. Comfortably sitting in our home office does not mean we are exempt from laws, regulations and company policies that govern the employer/employee relationship. Taking steps to clearly outline and reinforce company policies around harassment prevention, confidentiality and online behavior will help employers head off problems down the road.

Jackson Lewis P.C. · The Virtual Workplace: Keeping it Clean (Literally and Figuratively)



## Takeaways

The virtual workplace has blurred the line between our personal and professional spaces — but the behavior that constitutes harassment in the workplace remains the same. Comfortably sitting in our home office does not mean we are exempt from laws, regulations and company policies that govern the employer/employee relationship. Taking steps to clearly outline and reinforce company policies around harassment prevention, confidentiality and online behavior will help employers head off problems down the road.

## What Employers Need to Know

- Reliance on video platforms to conduct business has triggered a host of new employment issues and risks for employers who are responsible for monitoring how employees conduct themselves in the workplace. Compliance with employee policies and protocols, including the confidentiality of client information, has created new challenges for employers as change necessitated by the pandemic continues.
- Harassment can still occur in the virtual workplace in a number of ways.

Potential problem areas include:

- Chat rooms;
- Inappropriate screen names;
- Recording of chats; and
- Non-inclusion in virtual meetings or events.
- Confidentiality can also be compromised in the virtual workplace.
  - Employees may send documents to their personal emails to print, meaning information and documents are moving outside of firewalls or other enterprise-wide security measures.
  - Discarding rather than shredding printed materials can compromise information.
  - Using noncompany devices can create security vulnerabilities.
- Be sure to set specific and measurable expectations for employees.
  - Require employees to execute updated confidentiality agreements to create a mechanism to ensure the return of confidential information. and, if necessary, to pursue damages to recover compromised information.
  - Reiterate policies around confidential information, preservation of information, personal email/device use and acceptable behavior on online platforms.
  - Issue company secured devices as much as possible.
  - Continue (for those jurisdictions already mandated to) or begin conducting EEO and anti-harassment training with relevant hypotheticals and examples of behavior that can trigger litigation.
- Reinforce for managers that a more casual home environment can invite more casual, and perhaps inappropriate or unprofessional, conduct. Additionally, there is the danger that being alone in our own homes can create a sense of isolation leading to a lack of accountability or oversight. Employers should have regular virtual video conference meetings so employees are reminded that there is still accountability and supervisory responsibility.
- While our offices may all look different in 2020 and the future, our conduct, our behavior and our expectations should remain professional at all times.

## Transcript

Alitia (00:07):

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies and business oriented solutions to cultivate a workforce that is engaged, stable and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

The virtual workplace has blurred the line between our personal and professional spaces, but the behavior that constitutes harassment in the workplace remains the same. Comfortably sitting in our home office doesn't mean we're exempt from laws, regulations and company policies that govern the employer employee relationships. Taking steps to clearly outline and reinforce company policies around harassment prevention, confidentiality and online behavior will help employers head off problems down the road. This episode of We get work™, explores positive virtual

hygiene and offers tips to foster respectful work habits to maintain a harmonious workplace.

Our hosts today are Felice Ekelman and Stephanie Peet, principals respectably in the New York City and Philadelphia offices of Jackson Lewis. Felice, in her second time up at the We get work™ podcast mic has worked from her home in New York since the start of the pandemic and counseled clients on harassment issues in the remote workplace, hoping to help them avoid the old and new types of harassment litigation she typically defends on their behalf. Stephanie is currently working out of her home office near Philadelphia, also known as her kitchen table, and is likewise trying to help clients address or avoid the issues many employers are facing with remote employment, which eight months into the pandemic are now far more complex than the question we were all asking ourselves in March, which was, where can I make room for my home office? Felice and Stephanie, the question on everyone's mind today is how can creating and maintaining a harmonious remote workplace impact my business?

Felice Ekelman (02:30):

Stephanie, the genesis of this conversation came from that highly publicized incident when Jeffrey Toobin was seen masturbating on a video conferencing platform. I'm sure you heard about it. It got a lot of publicity.

Stephanie Peet (02:46):

I did hear.

Felice Ekelman (02:47):

And according to the press, oh, you did hear it, okay. And according to the press, he didn't deny engaging in the conduct. He just didn't think anyone could see him. That resulted in a lot of wide range of suspensions for him. And it got me thinking that the explosion in the reliance on video platforms to conduct business has triggered a host of new age employment issues. And there are lots of ways online that employees can be made to feel uncomfortable in the new remote video dependent workplace and that's created new challenges for employers to monitor the workplace. It's also created challenges to ensure compliance with workplace protocols, not just issues about conduct, but also issues about confidentiality. I thought we should talk about those today and I think that maybe the issue we should start with is the harassment issue since that's a lot sexier.

Stephanie Peet (03:59):

Well, I love to talk about it. Felice, I'm going to be honest. My first reaction as an employment lawyer, when we all went virtual, which started as two weeks and now I'm sitting here at my makeshift desk, eight months later, was, boy oh boy, employers have a lot to worry about in 2020. But one of the issues that they're not going to need to worry about is harassment in the workplace. We're all virtual. None of us are in the same room. We can't touch each other. We can't do anything that would be quote unquote harassment. And what we are learning, all of us, the employment lawyers and employers alike is that that's just not true. That harassment can happen. Harassment is happening in this virtual world, it's just

looking a little bit different.

The Jeffrey Toobin incident you described is a little bit on the extreme, but there are a lot of issues that we are seeing and we predict a lot of the listeners are going to start seeing in the event that they haven't. For example, how many times have you heard the joke when you log into this virtual conferencing platform and everyone looks appropriate from the waist up, but then someone automatically says, "Well, you don't know if I'm wearing pants." We've all heard that, haven't we?

Felice Ekelman (05:17):

I hate that one, I really hate that one. I'm always wearing pants or in the summer, shorts. Just so you know.

Stephanie Peet (05:26):

Well, thank you Felice. It's good to know, but not everyone apparently is. And even if they are, they're certainly joking that they're not. Does that one comment, Felice, amount to harassment? Probably not, but so there are those comments along with other stuff that are starting to give rise to harassment claims, for example.

Felice Ekelman (05:51):

Oh yeah. For what I was going to say is for example, there are a lot of situations where folks are commenting on what people look like and what their backgrounds are like, because we're seeing intimate photos of bedrooms, unmade beds, lingerie and the like and I'm sure you've been a party to some of those kinds of scenes in the backgrounds of video conferences that you've had.

Stephanie Peet (06:18):

We've gone from a real conference room and now all of a sudden, when we're on these virtual conference rooms, I'm in people's bedrooms. There's nothing more personal than that. And behind my boss and not really my boss, but in the hypothetical world could be my boss' bed and my boss' bed could be unmade. And on my boss's bed could be his undergarments. And that coupled with the fact that he just told me, he may not be wearing pants when we were having this conference call and he just commented on my attire, when you start adding these statements up and the conduct up, that's the alleged harassment that we're talking about.

One of the things recently happened to me and it's not in the employment world, but I'd be shocked if this hasn't yet happened for some of the folks listening. I was on a virtual conference platform with a court and my adversary was on. As you know and everyone probably knows at this point, you have your name appearing under your picture on these different platforms. My name Stephanie Peet was on the screen. I wasn't looking up at the time. Admittedly, I was looking down preparing and all of a sudden the court clerk chimes in and says, "Excuse me, sir, but your screen name is very inappropriate. It's offensive and if you don't change it, we're obviously canceling the call and going to discuss sanctions." I immediately look up to see what's happening. The person is no longer there then comes back, the name is changed. If you know me, you know I need to find out what happened so I gave him a call after the meeting and said, "What was the screen name?"

Turns out that he believes his 16 year old son thought it would be funny to go in and change his screen name. It was two names. I'm not going to curse for our listeners, but the first word was sexy and the second word rhymes with riches. Pretty funny to me, perhaps not to everyone, but again, when you take this screen name and then you couple that with yesterday, we just had a video conference and he was in his bedroom with the unmade bed, with the undergarments on the bed and then you add that to the other comments he's made, these are the grounds for the harassment claims that we're talking about.

Felice Ekelman (08:40):

The other thing I've seen are situations where employers have told me that folks make mistakes using the chat room. There are features in the chat room that allow you to chat with just one person or the entire room and sometimes folks make a mistake and they chat to the room when they mean to chat to one person and they can embarrass themselves with comments, particularly if those are comments made about their colleagues who are participating in the conversation.

I had another situation with an employer where while the video conference was ongoing, one employee was chatting privately to another and they were really engaged in an inappropriate and sexualized conversation for which one employee who felt offended by it, took screenshots of those so that they could be preserved and presented to their employer. There are lots of ways for people to, as you said in the beginning of the conversation, engage in unprofessional conduct on a video chat that I don't think anyone anticipated when these rooms began to proliferate in March and April of this year. Certainly that's an issue that employers are facing and need to deal with.

Stephanie Peet (10:10):

Let me ask you this, Felice, obviously there's these chat features on all of the platforms, have you ever been asked by a client and if so, what advice do you give, on whether or not employers should record and keep these chats for future use?

Felice Ekelman (10:26):

Well, the recording issue is a good one. To start off, I think most employers need to be certain that this is something that's controlled on an enterprise level, so that if there are conversations that they don't want recorded, that individual users don't have the ability to record those. Now we've all got our cellphones next to us and next to our personal computers, anyone can record a conversation on their cellphone. I guess you can do that in an old fashion conference room as well, but it's a lot easier to do and no one can see what you're doing at home in your personal space.

But as far as recording conversations, that's an important issue and you want to make sure that folks are not inadvertently or recording them without giving folks notice because that's going to impede free discourse. But also it may result in a situation where someone has said something that is either confidential and disclosed it and it's been recorded now or a situation where there's been some kind of a communication that might be inappropriate and it's now been captured live on the employer's system. And so that is something that the employer will have to

tackle with if the recording becomes an issue and might be discoverable and might have to be preserved. I think employers should think ahead of time about how they want to deal with recording meetings and make sure that participants in those meetings know whether they're being recorded and understand the proper protocols.

Stephanie Peet (12:11):

Yes, that's good advice. One other thing that I wanted to talk about on the harassment kind of inappropriate conduct piece that I've been finding is managers ridiculing employees through these video conferencing. I've seen it where managers will have a meeting, there are various employees in these meetings and for whatever reason, this manager doesn't like one or two of these employees specifically and has used the mute feature to mute these employees that he doesn't like or doesn't want to hear from so that person can't participate in the meeting. Think we can all agree that that's not appropriate for a variety of reasons. One, it makes the employee themselves feel terrible and not able to participate but it's really embarrassing when you're doing that in front of your colleagues.

Similarly, what I've been seeing is certainly at the beginning of COVID and the remote work at home were these virtual happy hours. I'm starting to hear harassment claims based on, I was never invited to participate in these types of virtual happy hours or the virtual social events that people are holding through these remote platforms. Again, it's another way to isolate and to ridicule employees, whatever the reason is, it's not okay. And it's certainly going to lay the basis for a harassment claim going forward. I don't know if you've seen that, Felice, but I've certainly been hearing about that more recently.

Felice Ekelman (13:44):

I think a lot of the issues that our clients have brought to us have to do with the informality that pervades working at home. Most folks are not wearing the same clothing that they wear when they go to the workplace. Most folks are not sitting in a formal workplace, they've got a makeshift kitchen table or desk or a dresser that they're using to do their work. And that whole environment has served to change the tenor of a lot of conversations. And I think managers and leaders need to make sure that they lead by example and a video conference is the same kind of protocol that's required as when we all walked into conference rooms back in the day and sat and behaved professionally. That's something that I think folks are going to have to pay more attention to because I think we're going to be working at home for a bit longer and we have to make sure that while we be growing weary of working from home, we don't let down our guard and forget that we're working and not hanging out. I think that's an important thing.

Stephanie Peet (15:01):

I agree with that.

Felice Ekelman (15:01):

Let's make sure we talk about confidentiality issues because I think that's important. And I know Stephanie, our listeners are dying to hear about what we have to say



about that. But look, one of the issues that we really have to pay attention to is making sure that confidential communications and documents that would normally be preserved and only used in a formal workplace that are now outside of the workplace are not being disclosed intentionally or inadvertently to third parties who have no business looking at confidential information. I don't know if you've talked to clients and about what steps they could be taking to ensure that their documents maintain their confidentiality, but I'd be interested in hearing your thoughts.

Stephanie Peet (15:48):

Yeah. I just want to address what the issues that I've been seeing relating to confidentiality in the work from home. The biggest one that I'm seeing is again, I don't necessarily think there's malicious intent, but it's the sending a work email to their personal email account in large part so they can print it out from their personal printer. Again, while it seems to be a perfectly innocent intention, there are some serious confidentiality and security concerns that arise from that. Assuming that the work email comes on a work computer and that there's firewall and other safety measures in place there, you lose that when you are sending it through the channels into your personal email. To the extent that there is confidential information, social security numbers, financial information, you are potentially exposing that and losing the security of that when you're making that email exchange.

The other big one is, so now you print out that email from your personal email account, you have a stack of documents with all a whole host of proprietary, confidential business information on there but I don't have a shredder at home like I did in the office. What am I doing? And what are people doing with these documents that they are printing out? Again, that has confidential information on it. Those are the issues that I'm seeing and that we've been dealing with frequently since we've been working from home.

Felice Ekelman (17:22):

Definitely significant problems dealing with documents that are being sent to personal emails, but let's not forget that we're assuming that folks are using devices that have been issued by the company. If someone's using their personal computer to conduct business, then there is really a loss of assurance that documents maintain their confidentiality. The benefit of issuing devices to employees, whether it's phones, but certainly laptops and computers, is that should the work relationship end, presumably you can retrieve your computer with all your business documents on there. If an employee has been using a personal computer to conduct business and is saving documents to a personal drive or the computer itself, the hard drive, then an employer who terminates an employee will not know whether they've really retrieved all of their documents because it will be very difficult to ascertain what's been saved and what's been deleted.

I think that's an important first step. And I think this is a good time for employers to think about whether they should be issuing confidentiality agreements to their employees. I'm not talking about a policy in a handbook, I'm talking about a real live agreement. One that's supported by consideration and will be enforceable so that an employer will have some way, some mechanism by which to ensure the return of

confidential information and if necessary can pursue damages to recover compromised information. I think this would be a good time for employers to think about whether they need to do a better job communicating to employees about the importance of maintaining the confidentiality of corporate documents, but also take steps to ensure a mechanism to retrieve them if necessary.

Stephanie Peet (19:30):

Yeah, and employers can use this time, remind employees what is confidential and business information, why it's so important that it needs to be preserved to the extent that they have a policy on not sharing that with your personal email account. All of these policies need to be reiterated. The policies hold the same force and effect if we're in a conference room at work or if I'm working out of my kitchen. The policy should still apply. And this is a really good time to remind the employees of what those policies are. Perhaps tell employees that don't print anything at this moment unless you absolutely need to.

Issue to the extent possible, I understand it can happen in every situation, but to the extent that you can issue secure laptops to people working from home and you having yet done that, we're going to be home for a little while so now's the time to start issuing those secure laptops to make sure that you can retrieve that information back to the extent that you need to. Again, save all company information and documents on the company hardware and on the company software. Don't save things to the extent you're using a personal computer on the personal computer. Again, it makes the retrieval to get that information back a lot harder.

Felice Ekelman (20:46):

What advice can we offer? I think one item that comes to mind is always training. To make sure that folks know what the expectations are. And when I think about training, of course, I'm thinking about EEO and non-harassment training. If you're in a jurisdiction employer where you have to conduct training on a regular basis as a result of state and local regulations, that obligation hasn't been excused simply because people are not reporting to the workplace. If you haven't conducted training using some kind of an online platform or even a virtual conferencing platform, you're going to need to start doing your training that way. And this would be an excellent opportunity, I think, to revamp the training and include some examples of inappropriate conduct as they may occur in the virtual workplace. I think that would really help people understand how conduct on a platform can later be viewed as unprofessional and possibly even support a harassment claim.

Stephanie Peet (21:55):

I agree, Felice. You mentioned earlier about part of the inappropriate conduct in these conferences is resulting from the casual nature of the work from home environment. I think it's twofold. I agree that we are much more casual, which is going to parlay itself into more casual conduct, perhaps inappropriate, unprofessional conduct. But I also think because we're all kind of isolated in our own homes, there's this at least feeling about a lack of accountability or a lack of oversight. And I think my suggestion would be to employers, have these virtual



conference platform meetings with some level of frequency so people remember and appreciate the fact that there is still accountability. There is still supervisory responsibility and management here. You're not on an island unto yourself.

Felice Ekelman (22:46):

Good point. I think we've given employers a little bit of homework or at least food for thought. Communicate expectations about online conduct. Don't forget to do non-harassment training, particularly if you're required to in your jurisdiction. Make sure that that training's relevant and includes hypotheticals about our real life work situation and take a look at the issues that might impact the confidentiality of your communications to make sure that recordings are only happening when you want them to happen, that your documents are being preserved and that employees don't forget that they're working, even though they're at home.

Stephanie Peet (23:31):

Yeah. I think the last point you made is the good point, which is again, while the workplace looks different, we're still expected to do the same type of work and we're expected to conduct ourselves in the same way as if we were in the real conference room in the real office space. While everything looks different, our conduct, our behavior and the expectations really should be the same.

Felice Ekelman (23:55):

Thanks for talking, Stephanie.

Stephanie Peet (23:57):

Felice, always a pleasure. Thank you.

Speaker 1 (24:03):

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