



AUGUST 2025

FAQ: Remote Work Racial Discrimination

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1. At a glance.

Today, remote work, often in the form of hybrid work, is widespread and the capacity to work remotely is a core feature of employment for many workers.¹ Workers view remote work as another dimension of compensation; employers heavily advertise remote work options as a recruitment tool; and remote work terms are often outlined in employment contracts or other employment documents.²

However, not all workers have access to remote work. Longstanding racial inequality drives who gets access to remote work, as workers of color tend to be concentrated in jobs and industries with less remote work available.³ But beyond racial inequality, data suggests that remote work racial discrimination is a factor, as some employers can make racially discriminatory decisions with respect to who get to work remotely.⁴

2. What is the racial remote work gap?

Black and Latine workers have less access to remote work options than their White and Asian counterparts.⁵ Much of this disparity stems from deep-seated educational and occupational inequalities that lead these groups to be concentrated in industries that simply have fewer remote work options available.⁶ For instance, Latine workers are less likely to obtain a bachelor's degree or a degree in a STEM field than other racial or ethnic groups, making it less likely that they are employed in an industry where remote work is prevalent.⁷ Instead, Latine workers are overrepresented in the construction, agriculture, transportation, meat processing, and services industries, where jobs largely require facetime.⁸ Similar patterns of occupational segregation exist among Black workers.⁹

3. What is remote work racial discrimination?

Not all the racial remote work gap can be explained away by structural inequalities. After controlling racial differences in education and occupation, a racial remote work gap remains.¹⁰ This suggests that beyond entrenched inequalities, some employers may be denying access to remote work arrangements based on race.¹¹ In other words, they may be discriminating. Employers, afraid of losing control, tend to grant remote work arrangements to those they deem “most trusted and highly productive.”¹² Pervasive negative racial stereotypes can lead employers to distrust workers of color¹³ and thus, deny them access to remote work options.¹⁴

FAQ: Remote Work Racial Discrimination

A study by the National Institute for Occupational Safety and Health (“NIOSH”) found that “after controlling for variables [including education and occupation], the odds for [Latine] workers to [work remotely] were 16% lower than for White workers and the odds for Black workers to [work remotely] were 7% lower than for White workers.”¹⁵ The study concluded that the “possibility of racial discrimination in [remote work] could not be ruled out” as companies may be “more reluctant to allow Black and [Latine] workers” to work remotely.¹⁶

4. Why does remote work racial discrimination matter?

Remote work is a powerful tool for workplace inclusion, but remote work discrimination undermines remote work’s equalizing potential. Remote work can allow women of color, whose lives are disproportionately centered around caregiving, to better balance their work and care responsibilities.¹⁷ It can also allow workers of color to access higher paying work while avoiding the toll of relocating to a more expensive or less racially representative location.¹⁸ Moreover, remote work can serve as a protective mechanism, at times shielding workers of color from racial microaggressions or physical harm.¹⁹ Many workers of color want and highly value remote work²⁰ and it can lead workers to join, rejoin, or reconsider an exit from the workforce.²¹ But racial discrimination can shut workers of color out of valuable opportunities for remote work.

5. Can workers sue if they have been discriminated with respect to remote work conditions?

Workers have brought lawsuits alleging that their employers have illegally shut them out of valuable remote work opportunities based on their race and other protected classes, including color, religion, sex, national origin and disability.²² But courts are inconsistent with respect to whether remote work discrimination claims can or cannot legally proceed. While some courts have found that the discriminatory deployment of remote work is actionable,²³ other courts find it is not.²⁴

FAQ: Remote Work Racial Discrimination

Frequently, legal challenges to alleged discriminatory remote work practices fail, early on in litigation.²⁵ The claims often fail because plaintiffs are unable to clear the adverse employment action standard required for most workplace discrimination claims.²⁶

Our seminal federal workplace anti-discrimination framework, Title VII, requires a showing of harm to the compensation, terms, conditions, or privileges of employment, or what is judicially termed an “adverse employment action.”²⁷ This standard is mirrored in the Americans with Disabilities Act (the “ADA”),²⁸ the Age Discrimination in Employment Act (the “ADEA”),²⁹ and many states’ workplace anti-discrimination laws.³⁰ And while some courts have allowed remote work discrimination claims to proceed, many have deemed remote work to not be a core feature of employment. Therefore, some courts consider that employer actions impacting remote work do not give rise to an adverse employment action.³¹ Instead, many courts view remote work as a rarefied perk, and as a result, workers subjected to discriminatory remote work practices too often have no legal recourse.³²

6. What can be done about remote work racial discrimination?

Employers, courts and regulators can all play a role in addressing and reducing instances of remote work discrimination. Employers should carefully consider decisions regarding who gets to work remotely and institute formal policies and procedures to limit the persistence of bias in decisions regarding the allocation of remote work. Courts should find remote work discrimination actionable and can rely on cases involving similar factual scenarios where courts have intervened,³³ as well as a recent Supreme Court decision, *Muldrow v. City of St. Louis, Missouri*, which significantly broadened the kinds of employer actions that are subject to Title VII relief.³⁴

In addition, if remote work discrimination has occurred, courts can award monetary damages, including for the additional costs associated with transportation or care of a family member.³⁵ Finally, regulators should issue regulatory guidance clarifying that a denial of remote work³⁶ can constitute harm with respect to the “compensation, terms, conditions, or privileges of employment,” under workplace anti-discrimination law, including Title VII and its analogs.³⁷

FAQ: Remote Work Racial Discrimination

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¹ Nicholas Bloom et al., *Survey: Remote Work Isn't Going Away — and Executives Know It*, HARVARD BUS. REV. (Aug. 28, 2023), <https://hbr.org/2023/08/survey-remote-work-isnt-going-away-and-executives-know-it>; Bob Helbig, *Remote Work Opportunities Continue to Give Some Employers the Edge*, THE WASHINGTON POST (Feb. 20, 2024), <https://jobs.washingtonpost.com/article/remote-work-opportunities-continue-to-give-some-employers-the-edge/> (“Once a rare perk, working from home has become something more job seekers expect.”); Gretchen Gavett, *Remote Work Isn't a Perk to Toss into the Mix*, HARVARD BUS. REV. (Sept. 28, 2021), <https://hbr.org/2021/09/remote-work-isnt-a-perk-to-toss-into-the-mix>; Tim Hennessy, *Thriving Together: Wellness and Group Benefits in Hybrid and Remote Work*, INT’L FOUND. OF EMP. BENEFIT PLANS (July 30, 2024), <https://blog.ifebp.org/thriving-together-wellness-and-group-benefits-in-hybrid-and-remote-work/> (“Once viewed as a rare perk, working from home (WFH) became necessary for many during the pandemic.”).

² See, e.g., Catherine Rampell, *Why return to office mandates are an invisible paycut*, THE WASHINGTON POST: OPINION (Dec. 6, 2024), <https://www.washingtonpost.com/opinions/2024/12/06/return-to-work-mandate-pay-cut/>; Zoe B. Cullen, et al, *Home Sweet Home: How Much Do Employees Value Remote Work?*, (Nat’l Bureau of Econ. Research Working Paper No. 33383), <https://www.nber.org/papers/w33383#:~:text=We%20estimate%20the%20value%20employees,times%20th at%20of%20previous%20studies> (“On average, employees are willing to accept a 25% pay cut for partly or fully remote roles.”); FUTURLAB, <https://www.futurlab.co.uk/>; *Accelerating with Remote-First*, CIMPRESS (Feb. 8, 2021), <https://cimpres.com/accelerating-with-remote-first>; George Paul, *Okta Hires Dynamic Work Lead as it does Remote First*, THE ORG (Feb 15, 2023), <https://theorg.com/iterate/okta-hires-dynamic-work-lead-as-it-goes-remote-first>; Danielle Abril, *The Future of Work: Taskrabbit CEO Permanently Ditches the Office*, WASHINGTON POST (May 25, 2022), <https://www.washingtonpost.com/technology/2022/05/25/taskrabbit-remote-work/>; *Twilio is Now a Remote-First Company*, TWILIO (May 11, 2022), <https://www.twilio.com/en-us/blog/twilio-is-now-a-remote-first-company>; *Work Where You Work Best*, VISTA, <https://careers.vista.com/remote-first/>; MINNESOTA OFF. OF MGMT. AND BUDGET, <https://mn.gov/mmb-stat/policies/remote-worker-offer-letter-template.docx>; CARNEGIE MELLON UNIV., <https://www.cmu.edu/career/documents/on-campus-employment/for-supervisors/2022/remote-offer-letter-with-contingency-language.docx>; Rana Bano, *Need to Write a Job Offer Letter? I've Got You Covered [Free Template & Examples]*, HUBSPOT (Nov. 20, 2024), <https://blog.hubspot.com/marketing/offer-letter-template>; *How to Draft an Offer Letter for Developers Who Work Remotely*, BLUE CODING (Dec. 16, 2022), <https://www.bluecoding.com/post/how-to-write-an-offer-letter-for-remote-developers>.

³ Abay Asfaw, *Racial and Ethnic Disparities in Teleworking Due to the COVID-19 Pandemic in the United States: A Mediation Analysis*. 19(8) INT. J. ENVIRON. RES. PUBLIC HEALTH 2022, 4680 at 2.

⁴ *Id.* (“Overall, disparities in four-year college education and occupation explained 83% and 78% of the variation in the odds of teleworking for Black and Hispanic workers, respectively. [...] The results of this study could not rule out the possibility of racial discrimination in teleworking.”).

⁵ *Id.* (“Hispanic and non-Hispanic Black workers teleworking due to COVID-19 were 24.3 and 30.9, respectively, compared to 40.6% of non-Hispanic White and 51.4% non-Hispanic other/multiple workers. In

FAQ: Remote Work Racial Discrimination

August 2020, the share of Asians who teleworked was three times higher than the share of Hispanic or Latino workers who teleworked.”).

⁶ *Id.*

⁷ The greatest proportion of remote workers are in computer and mathematical fields. See Sabrina Wulff Pablonia & Victoria Vernon, *Telework, Wages and Time Use in the United States* 20 REV OF ECON. OF THE HOUSEHOLD 684, 695 (Feb 25, 2022).

⁸ Rose Khattar et al., *Latino Workers Continue to Experience a Shortage of Good Jobs*, CTR. FOR AM. PROGRESS (Jul. 18, 2022), <https://www.americanprogress.org/article/latino-workers-continue-to-experience-a-shortage-of-good-jobs>.

⁹ Marina Zhavoronkova et al., *Occupational Segregation in America*, CTR FOR AM. PROGRESS (Mar. 29, 2022), <https://www.americanprogress.org/article/occupational-segregation-in-america>.

¹⁰ Asfaw, *supra* note 4.

¹¹ See *id.*

¹² Pablonia et al., *supra* note 7, at 691.

¹³ See, e.g., Joan C. Williams et al., *Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey*, 72(1) HASTINGS L.J. 337, 396-398 (2020), https://repository.uchastings.edu/hastings_law_journal/vol72/iss1/7 (referencing and describing workplace racial stereotypes).

¹⁴ See, e.g., *Wallen v. Teknavo Grp.*, No. 1:12-cv-06196-MKB-VVP (E.D.N.Y. Dec. 17, 2012) (where the Plaintiff alleged a denial of remote work due to his race); *Thompson v. Shutterstock, Inc. et al.*, No. 23-CV-4155 (JGLC), 2024 WL 2943813 at *8 (where the Plaintiff alleged that a remote work arrangement was rescinded due to his race).

¹⁵ These negative stereotypes can also lead workers of color to self-censor and request remote work less frequently due to fear of “negative career consequences associated with flexible working.” Heejung Chung et al., *Making Hybrid Inclusive: Black Workers Experiences of Hybrid Working* at 11, 25-26 UNIV. OF KENT AND THE TRADES UNION CONG. (Apr. 18, 2024) (“BME workers may feel less able to ask for flexibility potentially due to the fear of negative career consequences associated with flexible working or other negative repercussions.”).

¹⁶ *Id.*

¹⁷ Kim Parker, *About a Third of U.S Workers Who Can Work From Home Now Do So All the Time*, PEW RSCH. CTR. (Mar. 30, 2023), <https://www.pewresearch.org/short-reads/2023/03/30/about-a-third-of-us-workers-who-can-work-from-home-do-so-all-the-time> (“Workers who are not self-employed and who are teleworking at least some of the time see one clear advantage – and relatively few downsides – to working from home. By far the biggest perceived upside to working from home is the balance it provides: 71% of those who work from home all, most or some of the time say doing so helps them balance their work and personal lives.”). Women of color are particularly expected to provide unpaid care for children and adults. *Women of Color Shoulder Unfair Share of Caregiving*, OXFAM (Apr. 25, 2024), <https://www.oxfamamerica.org/press/press-releases/women-of-color-shoulder-unfair-share-of-caregiving-a-new-oxfam-and-prosperity-now-report-highlights/>. 10% of Latina women reported refraining from paid work due to caregiving. *Id.*

¹⁸ Shaun Harper, *Remote Work Can Boost Diversity yet Undermine Equity for Employees of Color*, FORBES (July 22, 2022, 11:47 AM), <https://www.forbes.com/sites/shaunharper/2022/07/22/avoiding-inequitable-remote-work-consequences-for-diverse-employees>.

¹⁹ Katherine Goldstein, *5 Things Employers Get Wrong About Caregivers at Work*, HARVARD BUS. REV. (Nov. 21, 2022), <https://hbr.org/2022/11/5-things-employers-get-wrong-about-caregivers-at-work>; Alexis Krivkovich et al., *Women in the Workplace 2024: The 10th-anniversary Report*, MCKINSEY & CO. (Sept. 17, 2024), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>; see also *Washington v. Offender Aid and Restoration of Charlottesville-Albemarle, Inc.*, 677 F. Supp. 3d 383, 388, 393 (W.D. Va. 2023) (where the plaintiff requested remote work out of fear for her safety following racial threats).

²⁰ Goldstein, *supra* note 179 (“[...] women, people of color, and caregivers are more likely to want to choose forms of flexible and remote work.”).

²¹ Adam Ozimek, *Remote Work is Enabling Higher Employment Among Disabled Workers*, ECON. INNOVATION GRP. (Oct 25, 2022), <https://eig.org/remote-work-is-enabling-higher-employment-among-disabled-workers>; Monica Nickelsburg, *Hybrid Revolution Leads to Surge of Working Moms. But Can They Have It All?* KUOW.ORG (Mar. 6, 2024); Orianna Rosa Royle, *Baby Boomers Say They Don't Need to Retire Now that They*

FAQ: Remote Work Racial Discrimination

Can Work from Home, FORTUNE (Oct. 30, 2024), <https://fortune.com/europe/2024/10/30/baby-boomers-no-retire-work-from-home-side-hustles-9-to-5s>; Nicholas Bloom et al., *Work from Home and Disability Employment* (Sept. 2024). (Nat'l Bureau of Econ. Rsch., Working Paper No. 32943) <https://www.nber.org/papers/w32943>, ("This paper provides causal evidence that the increase in WFH due to Covid led to a dramatic increase in disability employment. Our estimates imply that the post-Covid rise in WFH increased the full-time employment of individuals with a disability by 9% on average, and by as much as 36% in computer occupations.").

²² See, e.g., *Haas v. Zurich North Am.*, No. 05 C 1421, 2006 WL 2849699, at *4 (N.D.Ill. Sept. 29, 2006) (where the plaintiff alleged they were denied access to remote work due to their gender); *Washington v. Offender Aid and Restoration of Charlottesville-Albemarle, Inc.*, 677 F. Supp. 3d 383 (W.D. Va. 2023) (where the plaintiff alleged they were denied access to remote work due to their race); *Thompson v. Shutterstock, Inc.* et al., No. 23-CV-4155 (JGLC), 2024 WL 2943813 (S.D.N.Y. June 10, 2024) (where the plaintiff alleged they were denied access to remote work due to their race); *Doe 1, et al. v. George Washington Univ., et al.*, 369 F. Supp. 3d 49, 85 (D.C.C. 2019) (where the plaintiffs alleged that remote work was coercively imposed based on their gender); *Redmon v. U.S. Capitol Police*, 80 F. Supp. 3d 79, 87 (D.D.C. 2015) (where the plaintiff alleged they were denied access to remote work due to their race, gender, age, and disability).

²³ See, e.g., *Dixon v. Blinken*, No. CV 22-2357 (RDM), 2024 WL 4144105, at *3 (D.D.C. Sept. 11, 2024) (holding that a denial of plaintiff's request to change his telework day on only one occasion might constitute an adverse employment action); *Miller v. O'Malley*, No. 20 C 2118, 2024 WL 4240443, at *4 (N.D. Ill. Sept. 19, 2024) (holding that a denial of remote work that resulted in a \$3,000 loss for the Plaintiff constituted an adverse employment action).

²⁴ See, e.g., *Daniels v. Fed. Reserve Bank of Chi.*, 2006 WL 861969, at *12 (N.D. Ill. Mar. 31, 2006) (dismissing a race-based remote work discrimination claim on summary judgment); *Seldon v. Nat'l R.R. Passenger Corp.*, No. CIV.A. 05-4165, 2007 WL 3119976, at *4 (E.D. Pa. Oct. 24, 2007) (dismissing a race-based remote work discrimination claim on summary judgment); *Redmon*, 80 F. Supp. 3d 79, at 87 (dismissing on a race, gender, age, and disability discrimination claim premised on the denial of remote work pursuant to a motion to dismiss).

²⁵ See *id.*

²⁶ Most workplace discrimination claims are brought under disparate treatment theory which requires the demonstration of an adverse employment action. E2 Business Law Monographs § 2.01 (158th ed. Sept. 2024) ("Disparate treatment claims constitute the vast majority of challenges made."); Autumn George, *Adverse Employment Action – How Much Harm Must be Shown to Sustain a Claim of Discrimination under Title VII*, 60 MERCER L. REV. 1075, 1076 (2008) ("Adverse employment action is a judicially coined term for the actual language of § 703(a)(1) which states that the action must affect the employee's compensation, terms, conditions or privileges of employment.") (internal quotations omitted).

²⁷ 42 U.S.C. § 2000e-2(a)(1).

²⁸ 42 U.S.C. § 12101 et seq.

²⁹ 29 U.S.C. 621 et seq.

³⁰ Many states' workplace anti-discrimination laws follow Title VII's disparate treatment framework. For instance, the New Jersey Supreme Court has adopted Title VII's framework for interpreting claims under the New Jersey Law Against Discrimination ("LAD"). See *Ashton v. AT & T Corp.*, No. CIV.A.03-CV3158(DMC), 2005 WL 2320899, at *3 (D.N.J. Sept. 22, 2005) *aff'd sub nom.* *Ashton v. Am. Tel. & Tel. Co.*, 225 F. App'x 61 (3d Cir. 2007). California has similarly adopted Title VII's framework for interpreting claims under the California Fair Employment and Housing Act ("FEHA"). See *Sandell v. Taylor-Listug, Inc.*, 188 Cal. App. 4th 297, 307 (2010).

³¹ See, e.g., *Turner v. General Motors, LLC*, No. 19-007309-CD, 2022 WL 21737483, at *3 (Mich. Cir. Ct. Mar. 07, 2022), *aff'd*, 2023 WL 6780124, at *1 (Mich. Ct. App. Oct. 12, 2023) ("Here, the loss of work-from-home privileges was not an adverse employment action as it does not equate to a demotion or material loss of benefits."); *Homburg v. UPS, Inc.*, 2006 WL 2092457, at *9 (D. Kan. Jul. 27, 2006) (holding that the denial of a request to work from home is not an adverse employment action); *Daniels*, 2006 WL 861969, at *12 (N.D. Ill. Mar. 31, 2006) (holding that a manager's refusal to permit an employee to work from home was not an adverse employment action); *Seldon*, No. CIV.A. 05-4165, 2007 WL 3119976, at *4 (finding that "plaintiff's

FAQ: Remote Work Racial Discrimination

desire to work from home is such an individual preference” and therefore, a denial of remote work was not an adverse employment action) (internal quotations omitted).

³² See *id.*

³³ *Weng v. Solis*, 960 F. Supp. 2d 239, 249 (D.D.C.2013) (holding that withdrawing plaintiff’s work from home arrangement constituted an adverse employment action); *Heavans v. Dodaro*, 648 F. Supp. 3d 1, 14 (D.D.C. 2022) (holding that the revocation of remote work constituted an adverse employment action); *Dixon v. Blinken*, No. CV 22-2357 (RDM), 2024 WL 4144105, at *3 (D.D.C. Sept. 11, 2024) (finding that Plaintiff’s “approved telework schedule was plainly a term, condition, or privilege of his position.”); *Miller v. O’Malley*, No. 20 C 2118, 2024 WL 4240443, at *4 (N.D. Ill. Sept. 19, 2024) (a denial of remote work constituted an adverse employment action under the *Muldrow* test).

³⁴ *Muldrow v. City of St. Louis*, 601 U.S. 346, 359 (2024) (plaintiff “need show only some injury respecting [their] employment terms or conditions” that leaves them “worse off” but “need not” demonstrate that they are “significantly” worse off).

³⁵ See, e.g., *Miller v. O’Malley*, No. 20 C 2118, 2024 WL 4240443, at *4 (N.D. Ill. Sept. 19, 2024) (where the denial of remote work resulted in a \$3,000 loss for the Plaintiff)

³⁶ Or, in some rare instances, coercive imposition of remote work by employers may also constitute a form of discrimination.

³⁷ 42 U.S.C § 2000e-2(a)(1).