

# Client Alert

## May 24, 2024

### EEOC Releases Workplace Guidance to Prevent Harassment

The Equal Employment Opportunity Commission (EEOC) published final guidance on harassment in the workplace. This guidance, “Enforcement Guidance on Harassment in the Workplace,” is intended to assist employers in complying with the legal standards and understanding potential liability for harassment claims. All laws enforced by the EEOC prohibit workplace harassment based on a protected characteristic, including race, color, religion, sex (including sexual orientation; gender identity; and pregnancy, childbirth, or related medical conditions), national origin, disability, age (40 or older), and genetic information (including family medical history). We note that employers must also comply with applicable New York State law regarding harassment and discrimination.

Some of the key provisions of the guidance include:

Harassment can occur when it is based on the combination of two protected characteristics; when the harasser is wrong about the victim’s protected characteristic; when the harasser shares the victim’s protected characteristic; and when the harassment is based on the victim’s association with somebody who does not share the same protected characteristic as the victim. The harassment must involve a change to the individual’s employment (e.g., termination or demotion, or reassignment—unless agreed to by the employee) or create a hostile work environment.

Harassment takes many forms and can include a wide array of conduct, including:

- Saying or writing an ethnic, racial slur or sex-based slur;
- Threatening or intimidating a person because of the person’s religious beliefs or lack of religious beliefs;
- Mocking a person’s disability or accent;
- Asking intrusive questions about a person’s sexuality;
- Forwarding an offensive or derogatory email;
- Displaying offensive material;
- Making sexual gestures or comments;
- Threatening a person’s job in exchange for sexual favors.

Employers are responsible for preventing workplace harassment and for quickly ending harassing behavior once they learn about it even if it has not risen to the level of creating a hostile work environment. Steps employers can take to comply with these obligations include:

- Having an anti-harassment policy;
- Instituting a complaint process which includes options for employee reporting and an investigation process;
- Providing recurring training to employees about the company’s policy and complaint process;
- Taking an active role in ensuring the policy and complaint process are effective and are being followed.

Harassment investigations conducted by employers should be prompt, impartial, and thorough to determine whether harassing conduct occurred and whether corrective actions are needed to promote a safe, fair, and productive work environment. Corrective action can include other

options than just termination of the harasser. Understanding the demographic of your workforce is crucial in tailoring and assessing the effectiveness of these policies.

We note that on May 13, 2024, attorneys general from 18 Republican states filed a lawsuit in the U.S. District Court for the Eastern District of Tennessee against the EEOC, seeking to block enforcement of the EEOC's new harassment guidance as it pertains to transgender employees. We will update you when there are developments with this matter.

For assistance complying with EEOC guidelines, creating anti-harassment policies, and ensuring an effective complaint and investigation process, please contact our office.

## Transgender Harassment, Reverse Discrimination Cases Allowed by Courts

Two recent cases have shown that Federal courts are consistently considering alleged harassment or discrimination based on gender status to be allowable under Title VII of the Civil Rights Act.

In *McCreary v. Adult World, Inc.*, No. 2:23-cv-04332-MMB (E.D. Pa. Apr. 8, 2024), a clerk alleged that two transgender clerks received favorable treatment. There, the court stated that if discrimination based on transgender status is discrimination based on sex, then so too must discrimination based on cisgender (i.e., gender corresponds to a person's sex assigned at birth) status.

In *Copeland v. Ga. Dep't of Corr.*, 97 F.4th 766 (11th Cir. 2024), a transgender man alleged that he suffered intentional and repeated misgendering by his supervisors and co-workers. The 11th Circuit held that while an occasional mistake using the incorrect name or pronouns will not create liability, misgendering an employee can be "severe and pervasive" enough to support a claim of hostile work environment under Title VII.

We note that in New York, it is unlawful to discriminate against someone because of their gender identity or expression. Moreover, it is unlawful for an employer to subject such an individual to harassment because of their gender identity or expression **regardless of whether such harassment would be considered severe or pervasive**. The "severe and pervasive" standard was removed from the NYS Human Rights law in 2019 (and from NYC law in early 2000s). Based upon the applicable standard, harassment is an unlawful discriminatory practice only when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in the protected characteristic and when it consists of more than "petty slights or trivial inconveniences".

Implications for employers:

Employers must comply with all federal and state employment non-discrimination statutes and Equal Employment Opportunity guidelines. In order to comply with these obligations, Employers must take meaningful steps and make reasonable accommodations to honor transgender and non-binary employees' requests regarding their gender identity and personal pronouns.

Employers can ensure compliance with state and federal law by instituting the following:

- Implement counseling, employee training, and take disciplinary action when employees repeatedly misgender another employee.
- Respond to gender identity discrimination complaints just as they would complaints from any other protected characteristic.
- Offer a training program for handling accommodation requests.
- Periodic and annual training of employees to include anti-harassment and discrimination, LGBTQ+, gender identity, gender expression, the differences between transgender and cisgender and gender non-binary, the difference between sexual orientation and gender identity, and how restroom usage is based on consistent gender presentation, not the gender assigned at birth.

Finally, employers should work with employees during their gender transition process. Discussing a gender plan interactively with an employee, creating communication strategies with staff about a co-workers transition, and creating and distributing a transgender employment policy are all ways to create a respectful environment for all.

## Change to Fiscal Intermediary Reimbursement

DOH has informed Managed Care organizations that effective July 1, 2024, Fiscal Intermediary (FI) funding will be removed from existing plan capitation and paid on a managed fee-for-service (FFS) basis with FIs billing plans, plans billing the tiered FFS schedule through newly established rate codes, and then passing the exact amounts back to the FI.

The FFS Administrative Services rates would be consistent with three-tier Per Member Per

Month (PMPM) rate structure (see below) for reimbursement of the administrative services component for CDPAP implemented several years ago. When it was implemented, DOH indicated that it was not applicable to managed care.

The Administrative rates would be paid in addition to direct labor costs, but we note that there has been a lack of clarity as to the categories of costs that would be included in labor cost versus admin cost.

The table below depicts the tiers for the number of Direct Care Hours authorized per month per Consumer and FI PMPM reimbursement.

We will provide updates as additional details becomes available.

Tier 1	1- 159 hours	\$145
Tier 2	160- 479 hours	\$384
Tier 3	480 hours and above	\$1,036

## DISCLAIMER

The information contained herein is provided by Glaser & Weiner, P.C. for informational purposes only. These materials should not be considered as, or as a substitute for, legal advice and they are not intended to nor do they create an attorney-client relationship. Because the materials included here are general, they may not apply to your individual legal or factual circumstances.

The information contained herein may be modified or rendered incorrect by future legislative or judicial developments. You should not take (or refrain from taking) any action based on the information you obtain from these materials without first obtaining professional counsel. It is possible that under the laws, rules or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation. © 2024 Glaser & Weiner, P.C. All Rights Reserved.



REPRESENTING HOME HEALTH CARE AGENCIES  
IN NEW YORK STATE

68 South Service Road ♦ Suite 100 ♦  
Melville, NY 11747

P: 516.304.5858 ♦ F: 516.304.5855  
[www.glaserweiner.com](http://www.glaserweiner.com)

---

## ATTORNEY ADVERTISING



Try email marketing for free today!