



CITY AND COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMMISSION

OVERVIEW OF THE EQUAL BENEFITS ORDINANCE

► *Introduction*

In 1996, the U.S. General Accounting Office issued a report citing 1,049 different federally based benefits given to people because they are married. There are many other governmental and societal benefits associated with the status of being married, not the least of which are employment-based benefits such as medical insurance coverage and retirement benefits. Because same-sex couples are forbidden the right to marry under the laws of all 50 states, the benefits associated with that legal status are largely denied them.

After working closely with local political clubs and community groups, on November 4, 1996, the San Francisco Board of Supervisors passed a law that, in an unprecedented way, attempted to address one aspect of this discrimination: employee benefits. Commonly called the Equal Benefits Ordinance, this law amended the City's Nondiscrimination in Contracts Ordinances (Chapters 12B and 12C of the San Francisco Administrative Code). On December 8, 1996, Mayor Willie L. Brown, Jr. signed these amendments into law. A six month implementation period was instituted, and the law became effective on June 1, 1997.

At the time the Equal Benefits Ordinance took effect, approximately 500 companies nation-wide offered domestic partner benefits to their employees. As of November 1999, over 2,500 City contractors offer domestic partner benefits, the smallest with one employee and the largest with over 168,000. This covers a nationwide pool of approximately on million employees and reflects a fivefold increase in the number of companies offering domestic partner benefits.

► *Understanding the Law*

What the law requires

The Equal Benefits Ordinance prohibits the City and County of San Francisco from entering into contracts or leases with any entity that discriminates in the provision of benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of employees.

Who is covered by this law

All entities who hold or seek to enter into contracts with the City and County of San Francisco for public works or improvements, for a franchise, concession or lease of City property, or for goods, services or supplies to be purchased at the expense of the City and County are covered by this law.

The law does not cover entities with which the City does less than \$5,000 worth of business per year. Subcontractors are not required to comply with this law. Each party to a joint venture must comply independently.

What benefits are covered

In most cases, the law applies to all benefits offered by a contractor to its employees who have spouses or domestic partners and all benefits offered directly to such spouses or domestic partners, even when the employee pays the entire cost of the benefit. This includes, but is not limited to, medical insurance, retirement plans, leaves of absence (such as bereavement and family medical leave), use of company facilities, and company discounts.

Defining a domestic partner

The law defines a domestic partner as any person whose domestic partnership is currently registered with a governmental body pursuant to state or local law. This includes both same-sex and opposite-sex couples. To comply with the law, verification of domestic partnerships may take place only to the same degree and in the same manner as marriages are verified.

► *Business-Friendly Implementation*

Designing Rules of Procedure

The Rules of Procedure were developed to accomplish two goals: to inform the contracting public of the details of compliance and to accommodate the business reality of making benefit changes. The Rules define the essential terms of the Ordinance and, to further the City's goal of implementing the Ordinance in a business-friendly manner, they outline a flexible approach to implementation.

Delaying the implementation of benefits

Once a contractor makes it clear that it will comply with Chapter 12B, in certain situations ending discrimination in benefits may be delayed. For instance, offering some benefits, such as medical insurance, may be delayed until the contractor's next open enrollment period. Offering other benefits, such as bereavement leave, may be delayed briefly so that the contractor's personnel policies may be revised. Where benefits are governed by a collective bargaining agreement, a delay may be possible until the next bargaining cycle, so long as the contractor seeks the union's permission to offer the benefits sooner.

When ending discrimination is not possible

Some contractors may be unable to find an insurance company willing to offer domestic partner coverage. Others may find that a federal law (such as the tax code) prohibits extending a particular benefit to domestic partners on the same basis as it is extended to spouses. When a contractor takes all reasonable measures to stop discriminating, but can't for reasons outside of its control, it can comply with the Equal Benefits Ordinance if it agrees to pay a cash equivalent to those employees for whom equal benefits are not available. The City decides whether reasonable measures have been taken. The cash equivalent required is the amount of money paid by an employer for the spousal benefit that is unavailable for domestic partners, or *vice versa*.

Recognizing compliance in a variety of ways

So long as discrimination is ended, compliance can mean different things for different contractors. Some contractors comply with the requirements of the Ordinance by offering benefits to spouses, domestic partners and other individuals. One company, for example, has created a policy that extends some benefits to "other individuals if the relationship with [the employee] is especially close and it would be normal for them to turn to [the employee] for care and assistance." Other contractors comply by allowing each employee to extend benefits to one adult living in their household. Compliance also is possible where the benefits offered do not extend to spouses or domestic partners, or where no employee benefits are offered.

Waivers and exceptions

The Ordinance and Rules of Procedure articulate the terms under which a contract may be awarded to a non-compliant contractor. This occurs primarily where a contractor is the sole provider of a needed good or service, or where there is an emergency that threatens the public health or safety. Waiver may also be possible where a contract with a public entity provides the City with a good or service that would not be of the same quality or accessibility if obtained in the private sector, or where all possible contractors that could provide a needed good or service refuse to comply.

Insurance industry response

Research conducted prior to the effective date of the Ordinance turned up only 14 insurance companies willing to provide domestic partner medical coverage. Of those companies, only 3 were willing to cover small employee groups (under 50 employees). Today, the Commission has identified over 100 insurance companies who have joined the domestic partner insurance market, and of these, at least 35 will write policies in the small group market. Domestic partner coverage is now available in all 50 states.

Union response

Because many employees receive benefits through their collective bargaining agreements or through union trust funds, contractors and the Commission have tried to persuade unions

to include domestic partner benefits in their agreements. To date, dozens of unions have changed their policies to include domestic partner coverage. These include Locals affiliated with the Teamsters, Sheet Metal Workers, Operating Engineers, Carpenters, Cement Masons, Laborers and others.

➤ *Costs of Compliance*

The actuarial data is in – it doesn't cost a lot

Domestic partner medical insurance has been offered since 1982 when the *Village Voice* and a few other employers extended this benefit to their employees. In 1985, the City of Berkeley became the first municipality to follow suit. The actuarial data collected since 1982 show that neither claims experience nor enrollment rates create a significant increase in expenses. The cost of including domestic partners in other benefits programs (such as bereavement or family medical leave) is negligible.

Claims experience

Claims experience for domestic partner medical insurance is generally the same as – or less than – that for spouses. This is true because there are more childbirth-related medical expenses for spouses than for domestic partners, and these expenses are often quite high. Also, while some people fear that there will be a large number of people with HIV/AIDS enrolling in domestic partner medical insurance, this has not proven true. (In fact, the overall risk of adverse selection has not been borne out in the actuarial statistics.) In addition, the costs associated with covering HIV-related medical claims are no more than those for other major medical expenses, such as heart disease or cancer.

Enrollment rates

Enrollment rates for domestic partner medical insurance are low. When employers provide medical insurance for both same and opposite sex domestic partners of their employees, there is an average enrollment rate of three to four percent (3-4%); when only same-sex coverage is provided, the enrollment rate is often less than one percent (1%). This is true for several reasons. Some employees in same-sex relationships are reluctant to disclose their sexual orientation because of the possibility of discrimination by their employer or coworkers. Also, there is a financial disincentive created by the fact that tax laws treat the value of the insurance premium paid by the employer for domestic partner coverage as taxable income to the employee. This is not true for spousal insurance premiums, where no taxable income is created and employees pay for spousal insurance premiums with pre-tax dollars. The imputed income associated with domestic partner medical insurance can be prohibitive and discourages many employees from electing domestic partner coverage, especially when the domestic partner already has coverage through his or her own employer.

Administrative costs

When companies look at the administrative costs associated with implementing domestic partner benefits, it is important to emphasize that the changes being made to an employer's benefits plan are to the list of people eligible for a particular benefit, and not to benefit plan structure itself. Some computer modifications may be necessary to capture the imputed income tax associated with domestic partner medical insurance. Also, while at one time it may have been common for insurance companies to place surcharges on medical plans that cover domestic partners, this is no longer common. Where a surcharge is requested, employers can use as a negotiating tool the actuarial data that clearly demonstrates a lack of added claims exposure.

► *Reasons for Compliance*

Many companies complying with the Equal Benefits Ordinance realize that providing domestic partner benefits means more to them than getting City contracts. These companies understand that offering domestic partner benefits addresses issues of fairness, market competition, employee retention and diversity, all of which impact the success of a business operation.

Equal pay for equal work

A 1992 U.S. Census Bureau study estimated that 37-40% of all employee compensation comes in the form of benefits. In order to truly provide equal pay for equal work, many employers recognize that they must equalize the value of benefits offered to employees. Offering benefits for domestic partners takes a giant step in this direction.

Market competition & employee retention

Many companies realize that one way to attract and retain talented employees is to offer them the most competitive benefits package. They also realize that employee retention lowers turnover and recruitment costs, and helps to improve employee job satisfaction and performance. Employees often look for the inclusion of domestic partner benefits as a sign that an employer is committed to providing the most comprehensive and competitive benefits package. This is true even for those employees who don't have a domestic partner or don't intend to take advantage of the benefits. Because of these results, when one company in an industry extends benefits to domestic partners, it is common for others to follow.

Valuing diversity

Many companies understand that the U.S. workforce is increasingly diverse and that employees come from a wide variety of family structures. Many employees place a high value on their employer's commitment to diversity and will look for that commitment when choosing where to work. The inclusion of domestic partners in an employer's benefits

package demonstrates a commitment to diversity and sends a message to all employees that their unique qualities and individual circumstances will be appreciated.

► *Litigation*

Three lawsuits have been filed against the City challenging the legality of the Ordinance. The first was filed by the Air Transport Association (ATA), representing a collection of the nation's largest airlines. Claims raised in their complaint include allegations that the Ordinance violates preemption language found in the Employee Retirement Income Security Act (ERISA), the Airline Deregulation Act and the Railway Labor Act, as well as that the Ordinance violates the Due Process and Commerce Clauses of the U.S. Constitution and sections of the California Constitution and San Francisco City Charter. After a motion for summary judgment was filed by the ATA, a hearing was held on October 10, 1997 by Judge Claudia Wilken in Federal District Court. A partial decision was issued on April 10, 1998 upholding the ordinance in large part, and created two areas of limited application with respect to particular types of City contractors.

Jurisdictional limitations

The Court decision held that the City could no longer enforce the Ordinance with respect to a contractor's operations throughout the United States. While it is still City policy to encourage contractors to comply throughout their entire operations, the City can only require compliance in a contractor's operations located (a) in San Francisco; (b) on real property outside of San Francisco owned by the City or which the City has a right to occupy; and (c) elsewhere in the United States where work relating to a City contract is being performed.

Benefits covered by the law

For a limited number of contractors, the April 1998 court decision also created some changes in which benefits the Equal Benefits Ordinance may cover. When the City is acting as an ordinary consumer of goods and services, as compared to acting as a regulator, it can require that contractors provide all benefits, including health and pension benefits, in a nondiscriminatory way. The City acts as an ordinary consumer where it wields no more power in the marketplace than other entities contracting for similar goods, services or interests in real property.

For companies such as the airlines, the Court found that with respect to leasing property at the airport, the City is acting as a regulator because it owns and operates the Airport, which the Court described as similar to a monopoly. Based on the Court's interpretation of the preemption provisions and case law associated with ERISA, which governs employer-sponsored medical and pension benefits, in situations where

the City wields more power than an ordinary consumer, it cannot require that contractors provide nondiscriminatory health and pension benefits. In a July 1999 ruling, the Court held that benefits not covered by ERISA, such as bereavement leave, family medical leave, and company discounts (such as the flight benefits offered by the airlines), must be offered in a nondiscriminatory manner. The ATA has appealed this decision to the United States Court of Appeals for the Ninth Circuit.

Other lawsuits

The second lawsuit was filed by an electrical contracting business that alleged it would be denied City contracts because of its refusal to comply with the Ordinance. The attorneys representing the company were connected to the American Center for Law and Justice, a non-profit legal organization associated with televangelist Pat Robertson. Their causes of action were very similar to those raised by the airlines. This case was voluntarily dismissed by the company because of a lack of standing; the company had never sought a City contract.

The third lawsuit was filed in December 1997 by S.D. Myers, Inc. an Ohio-based company claiming that they were denied a City contract because their religious beliefs preclude their compliance with the Ordinance. The causes of action are similar to those filed in the earlier two suits, and like the second plaintiff, they are represented by the American Center for Law and Justice. To date, the City has successfully defended itself in this litigation. S.D. Myers has appealed to the United States Court of Appeals for the Ninth Circuit.

► Available Resources

The Human Rights Commission has developed resources to help businesses seeking to comply with the Equal Benefits Ordinance:

Rules of Procedure for guidelines on how the Ordinance is being implemented; detailed explanations of the terms used in the Ordinance and information on jurisdiction and other matters.

Resource Materials for in-depth answers to commonly asked questions on the Ordinance's impact on medical benefits, pensions plans, taxation; information on the cost of providing domestic partner benefits; model employee policies; model domestic partnership registry, and a list of domestic partner registries.

Insurance List of over 100 insurance providers around the country willing to write policies inclusive of domestic partners. Providers are available in all 50 states.

Table of Domestic Partner Registries listing all of the governmental registries in the U.S., how and where to register, the requirements of registration, and the rights and responsibilities associated with registering. (This item is not available on the website.)

Six Month Report issued January 6, 1998 providing a detailed summary of the Commission's implementation efforts and the compliance experience of the Ordinance's first six months.

Two Year Report issued August 12, 1999, providing a brief history of the Ordinance and detailed information on the compliance experience of the first two years of implementation.

You can get free copies of these documents and of the ordinance itself by calling the Human Rights Commission at 415-252-2500, or download them from the Commission's website at: <http://www.ci.sf.ca.us/sfhumanrights>.

11/99