

THE EQUAL BENEFITS ORDINANCE

A SIX MONTH REPORT

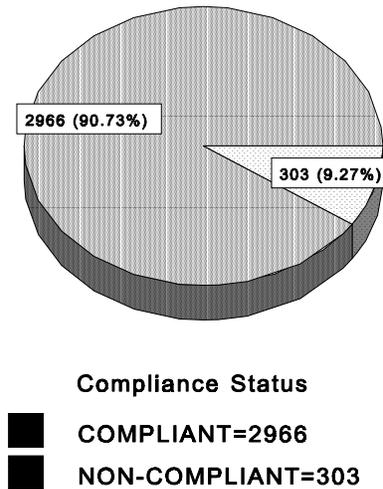


SAN FRANCISCO HUMAN RIGHTS COMMISSION
January 6, 1998

EXECUTIVE SUMMARY

At the time the Equal Benefits Ordinance took effect, approximately 500 companies nation-wide offered domestic partner benefits to their employees. Today, 1270 City contractors offer domestic partner benefits. This covers a nationwide pool of approximately 642,757 employees and reflects nearly a threefold increase in the number of companies offering domestic partner benefits. Of the 3269 compliance declarations that have been fully reviewed as of this date, 90.73% comply with the requirements of the Equal Benefits Ordinance.

Figure 1
City Contractors with finalized Equal Benefits Status (n=3269)



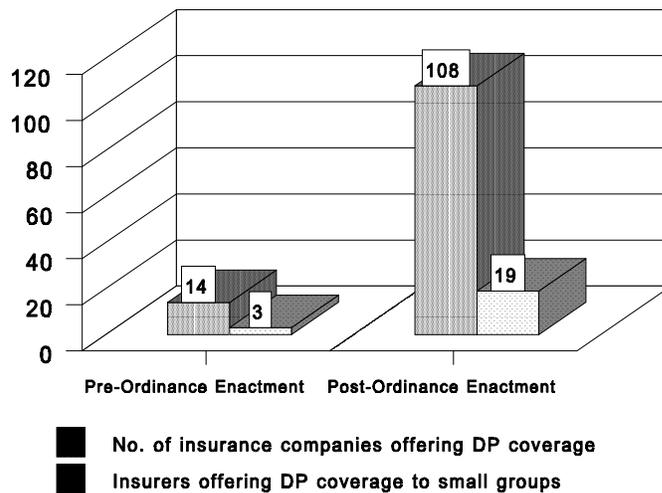
On June 1, 1997, revisions to San Francisco Administrative Code sections governing nondiscrimination in City contracts took effect. Six months after the effective date, the significant and positive impact of these changes is clear.

Known as "The Equal Benefits Ordinance," these amendments require City contractors to eliminate discrimination in the provision of benefits to their employees with spouses and their employees with domestic partners, or to the spouses or domestic partners of employees, in all of their offices in the United States. Compliance with the Ordinance also requires that each City contractor agree to not discriminate on the basis of a specified list of protected categories such as race, gender, sexual orientation and gender identity.

The Human Rights Commission, in conjunction with several other City departments and community and business groups, created a flexible implementation plan designed to recognize the business reality of making benefits changes. Resource materials and implementing guidelines were developed to assist businesses wishing to comply.

To assist City contractors in their efforts to comply, the Commission compiled a list of insurance providers offering domestic partner coverage to employee groups. Research conducted prior to the effective date turned up only 14 insurance companies willing to provide this coverage. Of those companies, only 3 were willing to cover small employee groups. Today, the Commission has identified over 108 insurance companies who have joined the domestic partner insurance market, and of these, at least 19 will write policies in the small group market. In addition, at least 15 union trust funds have modified their plans in order to offer domestic partner benefits to union employees.

Fig 2. Insurance companies offering Domestic Partner (DP) Coverage



The impact of this growth in the insurance industry has been felt across the country as *all* businesses, not just those seeking City contracts, have a larger and more competitive insurance market from which to purchase domestic partner coverage. In addition, the options available to small businesses have increased dramatically, making it much more feasible for these businesses to provide coverage for small employee groups.

I. 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. Of course 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 United States, the benefits associated with that legal status are largely denied them.

After working closely with the Harvey Milk Lesbian Gay Bisexual Democratic Club and other interested community groups and receiving public testimony, 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. This law, which amended the City's Nondiscrimination in Contracts Ordinances (Chapters 12B and 12C of the Administrative Code), prohibits the City from entering into contracts or leases with any business that discriminates between employees with spouses and employees with domestic partners with respect to any benefits they provide. On December 8, 1996, Mayor Willie L. Brown Jr. signed these amendments into law.

What the Law Requires

This historic piece of legislation marks the first time any jurisdiction has taken such action to address the employment discrimination faced by people in domestic partnerships. Its main premise is equal treatment. Employees with spouses and employees with domestic partners should receive the same total compensation: salary and fringe benefits. Benefits provided by the employer directly to the spouse or domestic partner should also be provided equally. The law does not require City contractors to begin offering benefits not previously offered. Instead, the law states that to the extent a City contractor does offer employee benefits that the spouse of an employee may take advantage of (such as medical insurance), or that an employee receives because he or she is married (such as bereavement leave taken because of the death of a spouse or parent-in-law), then the City contractor must offer the same benefits to the domestic partners of an employee or to the employee with a domestic partner. Of course, if a business offered benefits to domestic partners and not spouses, that discrimination would also have to end before a City contract could be awarded.

The ordinance defines the term "domestic partner" to mean any person whose domestic partnership is currently registered with a governmental domestic partnership registry. Since the vast majority of these registries, including San Francisco's registry, allow for both same and opposite sex couples to register, the ordinance requires nondiscriminatory benefits for both same and opposite sex couples.

The drafters of the law realized that it may not always be possible for a contractor to end discrimination because the contractor does not always have total control over the provision of benefits. For example, most employers contract with an insurance company to provide medical insurance to their employees. Some employers have unionized work forces and must negotiate with the union to determine what benefits the employees will receive. In these instances, contractors may still comply with the law by taking all reasonable measures to end discrimination and by offering a cash equivalent to those employees for whom providing benefits equally is not possible. The Ordinance also states that if it ever were to cost more to offer benefits to one group over the other, the excess cost could be passed on to the group for whom providing benefits costs more.

In addition to the equal benefits amendments to the Ordinance, the law also requires that City contractors not discriminate against employees, members of the public or City employees on the basis of race, sex, color, creed, national origin, ancestry, age, disability, sexual orientation, gender identity (transgender status), marital status, domestic partner status, and HIV status. They must also agree to include a similar provision in any subcontracts. While these provisions have been part of the Ordinance for many years (with different categories having been added at different times) this is the first time that contractors are faced with signing a declaration in which they affirmatively state that they will not discriminate on the basis of each individual category. For some contractors, this may be the first time that company officials truly consider what it means to not discriminate on the basis of such categories as gender identity, sexual orientation and HIV status.

Jurisdiction

The law applies to the entire U.S. operation of a company with whom the City is contracting. This means that if a contractor has several locations throughout the United States, the benefits offered in all locations must be nondiscriminatory. If a company is comprised of several legal entities (multiple subsidiaries for example) only the entity holding the City contract must comply. In the case of a joint venture, all joint venture partners are required to comply. Subcontractors are not required to comply, nor are contractors with whom the City does less than \$5,000 of business per year.

II. IMPLEMENTATION

Deferring the Effective Date

Realizing that a law of this magnitude could not be implemented within the normal 30 day process, the Board and Mayor deferred the implementation date until June 1, 1997. In the meantime, wanting to deter City departments and contractors from

entering into long term contracts that would avoid the requirements of the ordinance, the Board passed an advisory Resolution requesting that City departments attach the requirements of the ordinance to any contracts entered into prior to the June 1, 1997 effective date that had a duration of two or more years.

The Role of the Human Rights Commission

As the City department responsible for enforcing the City's previously existing nondiscrimination laws, including Administrative Code Chapters 12B and 12C, the responsibility of implementing and enforcing the new law was given to the Human Rights Commission. The Commission outlined a strategy that sought to implement the ordinance in a business-friendly manner with a streamlined approach designed to minimize the burden on City departments and City contractors.

To put this plan into action, the Commission sought the assistance and expertise of a variety of City officials who came together to form an advisory group, meeting to provide input into the Commission's plan of action and to identify resources both within City government and the broader San Francisco community. This group saw participation from the Mayor's staff as well as staff from the Board of Supervisors, Purchasing Department, Mayor's Office of Economic Development, Mayor's Office of Small Business, City Attorney's Office and the Small Business Advisory Commission.

Education and Outreach

To inform the public about the change in the law, and to educate contractors and City departmental personnel, the first phase of implementation focused on education and outreach. Written materials were prepared which included a brochure summarizing the ordinance and a packet of resource materials providing contractors with in-depth answers to the most commonly asked questions, a list of insurance providers offering domestic partner coverage, a list of jurisdictions with domestic partner registries and the requirements of each registry, sample internal domestic partner registry forms, and a series of sample personnel policies employers can use in drafting nondiscriminatory workplace policies. Since their production, over 2400 copies of these materials have been distributed; they also have been posted on the Commission's internet website.¹

A series of educational workshops, attended by over 700 people, were held at which City contractors and departmental personnel were given detailed information about the requirements of the ordinance. Contractors and City representatives were given time to raise their questions and have their concerns addressed. The availability of individualized consultation was announced at each workshop.

Special workshops were held for non-profit organizations and for small businesses (co-sponsored by the San Francisco Chamber of Commerce), so that their unique

¹ The Commission's website can be found at: www.sfhumanrights.org.

situations and concerns could be addressed. To publicize these workshops, notice was given in the City's Bid and Contract Opportunity newsletter and mailings were sent to the press, to lists of businesses obtained from the Chamber of Commerce and the Small Business Commission, and to Women- and Minority-owned businesses, businesses owned by Lesbian Gay Bisexual and Transgendered individuals and the many businesses and individuals who had already contacted the Commission seeking information about the ordinance.

Workshops also were held for City employees responsible for departmental contracting activities. Since the Ordinance's effective date, departments have been asked to identify departmental liaisons whose responsibilities specifically include identifying, prioritizing and working with contractors to seek compliance. Special workshops and educational mailings have been produced for liaisons and recently the City's mainframe was modified so that more information as to why a contractor's compliance is pending can be viewed within each department. A series of memoranda were distributed to department heads, including instructions for applying the Ordinance to different contracting situations and a flow-chart outlining the steps a department must take in evaluating whether a particular transaction falls under the purview of the Ordinance.

Helping Businesses Find Insurance Coverage

Prior to the enactment of the Ordinance, some businesses seeking to provide domestic partner medical coverage, especially small businesses, experienced difficulty finding an insurance company willing to issue such a policy. To address this deficit and the increased need for such insurance created by the ordinance, the San Francisco Chamber of Commerce developed a group insurance plan available to any of its member businesses, regardless of size. With this same goal in mind, the Human Rights Commission held an insurance fair on May 21, 1997, bringing together businesses seeking to add domestic partner coverage with a dozen insurance providers all of which offer domestic partner insurance coverage.

Determining Compliance

In order to determine whether a particular City contractor complies with the ordinance, a series of forms was developed. The first (HRC-12B-101) describes the requirements of the Ordinance on one side, and asks a series of questions designed to elicit information about compliance on the other. Designed as a declaration, this form must be completed by all contractors seeking to demonstrate compliance. For most contractors, supporting documentation must also be submitted, such as a copy of the eligibility section of their insurance policy which verifies equal coverage, and copies of personnel policies. The second form (HRC-12B-102) is designed to elicit information on what reasonable measures a contractor has taken to provide benefits equally and is used in the event the contractor wishes to assert that it is not able to end its discrimination in benefits. The third form (HRC-12B-103) is used when a contractor wishes to assert its

need to have more time before full compliance is possible. This form addresses delays resulting when a contractor must wait until their insurance policy can be amended or until their next open enrollment period occurs, time needed for amending written personnel policies or making administrative changes, and benefits which are collectively bargained.

A database was designed to capture all of the information gathered from contractors and to communicate this information to the City's contracting officers. This database also contains fields used by Commission staff to record the progress of contractors as they move toward compliance and facilitates the extended communication sometimes needed before full compliance can be met. The database also is used to generate letters which identify gaps in a contractor's submission and to request that the contractor forward the missing items to the Commission so that the contractor's status can be finalized.

Through an interface with the City's Purchasing Department, the Commission sends daily updates on the status of contractors with respect to compliance. Departmental personnel seeking compliance information may research a contractor's status on-line through the City's mainframe. Where a department has no access to the City's mainframe, printed reports can be ordered for weekly or monthly updates.

Notifying City Contractors

In order to ensure that businesses likely to seek City contracts are aware of the new contracting requirements imposed as a result of the Ordinance, on March 24, 1997, a mailing was sent to approximately 12,000 companies who had conducted or expressed interest in conducting business with the City during the past two years. This mailing consisted of a copy of the brochure, the basic compliance form (HRC-12B-101) and a Commission poster outlining City contractors' nondiscrimination obligations which all City contractors are required to post. The notice given by this mailing generated thousands of telephone calls and returned compliance forms. Over the past six months, the Commission has responded to over 6000 telephone calls regarding the Ordinance.

III. RULES OF PROCEDURE

Developing Rules of Procedure

To define some of the essential terms of the Ordinance and to further its goal of implementing the Ordinance in a business-friendly manner, the Commission developed a set of Rules of Procedure that both informed the contracting public of the details of compliance and recognized the business reality of benefits changes. In order to best capture this business reality, drafts of the Rules were distributed at each workshop and to a list of interested members of the business community and others. An extended period of public comment was allowed. On April 10, 1997, the Commission held a public hearing on the Rules at which, along with the general public, members of the Board of Supervisors, representatives from the Mayor's Office and business and community leaders testified. The Rules were adopted by the Commission on May 8, 1997.

Building in Flexibility

The Rules recognize that instant equality of benefits is not always possible. Flexibility is created where compliance is intended (and committed to) but a delay is warranted in order to allow the contractor to make necessary changes without greatly disrupting their business activities. For instance, a contractor may prefer to wait until its next open enrollment before benefits are implemented so it doesn't have to incur the cost and disruption of a change in benefits mid plan year. This is especially true of large companies that must communicate changes and enroll procedures to a large group of employees. Delay also may be warranted where substantial change is needed to a contractor's personnel policies; the Rules allow for a three month delay for that purpose, with more time allowed at the Commission's discretion. Where benefits are governed by a collective bargaining agreement, full compliance may need to be delayed until the next bargaining cycle, and the Rules allow for that provided that the contractor makes an effort to offer the benefits sooner, with the union's permission. The Rules also allow a contractor to provide unequal benefits where equal benefits are unavailable (after taking reasonable measures) so long as the contractor offers the closest approximation available. Wanting to encourage employers to provide their employees with the best benefits available, the Commission adopted this Rule in an effort to help contractors avoid situations where quality benefits for some employees would be replaced by inferior benefits for all employees.

Recognizing Different Options for Complying

The Rules recognize that so long as any discrimination is ended, compliance can mean different things to different contractors. Some contractors comply with the requirements of the Ordinance by offering benefits to individuals in addition to employees' spouses

and employees' domestic partners. For example, Bank of America has created a policy that, in addition to spouses and domestic partners, 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." Some contractors comply by offering benefits on a basis unrelated to both marital status and domestic partner status, for instance by allowing each employee to select one adult living in their household to receive benefits. Other contractors comply by providing benefits to neither employees' spouses nor employees' domestic partners; or by providing no employee benefits whatsoever.

Waivers and Exceptions

The Rules articulate the terms under which a contract may be awarded to a contractor even where that contractor continues to discriminate in the provision of benefits. 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 and there is a need to contract with a non-complying contractor in order to resolve the emergency. Waiver is also possible in certain other situations, such as 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.

Other Issues Addressed

The Rules articulate the acceptability of a contractor creating an internal domestic partnership registry for employees to use who do not have access to, or prefer not to use a governmental registry, so long as governmental registration also is honored. The Rules explain that verification of domestic partnership should only be made to the same extent as verification of marriage and that it is not enough for a contractor to institute benefits, the contractor must also inform its employees of the availability of such benefits.

IV. EXPERIENCE

Positive Impact

On the whole, the response to the Ordinance has been very positive. Some contractors have begun advertising their compliance with the Ordinance in their promotional materials. Others have told the Commission that while they had been considering offering domestic partner benefits for some time, it was this legislation that prompted them to actually implement such a plan. One company contacted the Commission to

express appreciation for the Ordinance, explaining that they had been purchasing individual insurance policies for the domestic partners of their employees because no insurance carrier would offer such coverage to their small group size. As a result of the Ordinance and the impact it has had on the insurance industry, the company can now obtain a group insurance plan which included domestic partner coverage, saving them a significant amount of money.

Contractor Compliance

To date, the Commission has received compliance paperwork (12B Declarations) from 5484 different contractors. Of the declarations received, the status of 3269 has been finalized with 2966 (90.73%) found to be in compliance (having ended any existing discrimination in the provision of benefits) and 303 (9.27%) found to still discriminate. Of the complying contractors, 1270 (43%) offer benefits to their employees, 1080 (36%) do not offer any benefits to their employees,² and 616 (21%) do not have any employees. The contractors complying that do offer benefits employ approximately 642,757 individuals nationwide. This includes 23 large companies (5000 or more employees), 66 medium sized companies (between 500 and 4999 employees) and 1181 small companies (under 500 employees). A list of the ten largest employers complying with the Ordinance (and offering benefits) is attached as Appendix A to this report.

Pending Contractors

Of the 2215 contractors whose status is still pending (which reflects 40% of the declarations received to date), the vast majority, 2172 are pending because the contractor has not yet responded to the Commission's request for more information. Only 43 of the pending contractors are pending because the Commission has not yet been able to review the paperwork they have submitted. With new declarations received each week, some pending contractors will exist at any given time.

Insurance Industry Response

In June 1997, when the Ordinance first went into effect, the Commission had been able to identify only 14 insurance providers willing to offer domestic partner coverage. As of the date of this report, over 108 different companies now offer such benefits. The number of companies willing to offer benefits in the small group market (2-50 lives) has increased from three insurance companies to over 19 insurance companies.

One insurance provider covering many small group employers in California is the Health Insurance Plan of California (HIPC). HIPC is a State of California run consortium of insurance providers, pulled together specifically to address the difficulty small group employers face in obtaining quality medical benefits that are financially feasible. As

² The majority of these contractors have fewer than twenty employees in their workforce.

implementation began, it became clear that HIPC would not include domestic partner coverage even though the individual insurance companies comprising the HIPC consortium would. Assemblywoman Carole Migden introduced A.B. 1059 which would, if passed, require insurance providers operating in California (including HIPC) to offer the same benefits to domestic partners as they do to other dependents. While the bill initially enjoyed bipartisan support in the Assembly, it was ultimately defeated. It is expected to be reintroduced in the next legislative session.

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, at least 15 unions have changed their policies in order to include domestic partner coverage. These include locals affiliated with the Teamsters, Sheet Metal Workers, Operating Engineers, Carpenters, Cement Masons, Laborers and other unions.

Waivers and Exceptions

Departments have requested 383 exceptions using HRC Form 1-A which addresses sole source, emergency and public entity exceptions. Of these, 285 were sole source waivers which were approved, 38 were denied and 17 were withdrawn (usually because the contractor came into compliance); 21 were emergency exceptions which were approved, 2 were denied and none were withdrawn; and 20 public entity exceptions were approved, none were denied or withdrawn. Two hundred and fifty Blanket Sole Source Forms (HRC-12B-104) were filed by over 20 different departments. This form was developed to address the repetition of waiver requests for items that would routinely be approved as a sole source, such as the purchase of postage or certain permit, membership and licensing fees. With approximately 9,000 contracts awarded since June 1, 1997, the number of waivers granted represents only six percent of the City's contracts for this time period.

Interest from Other Cities

Since news of the Ordinance's passage began, the Commission has received inquiries from other jurisdictions considering the adoption of similar provisions. Commission staff has engaged in discussions with and provided resource information to representatives from a variety of cities including New York, Seattle, West Hollywood and Boston. The San Francisco Redevelopment Agency, which is a quasi-state entity, already has adopted contracting rules almost identical to those contained in the Ordinance.

Lawsuits

Three lawsuits have been filed against the City challenging the legality of the Ordinance. The first was filed by the Air Transport Association, 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 City Charter. After a motion for summary judgment was filed by the ATA, a hearing was held on October 10, 1997 by Judge Claudia Wilkin in Federal District Court. A decision has yet to be issued in the case.

The second lawsuit was filed by P.M.& M., a company claiming to be an electrical contracting business that alleged it would be denied City contracts because of its refusal to comply with the Ordinance. The attorneys representing P.M.& M. included 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. No further action has taken place on this lawsuit.

The third lawsuit was filed in December 1997 by S.D. Myers, 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. No further action has taken place on this lawsuit.

Conclusion

The events that have taken place since the Equal Benefits Ordinance was first signed into law at the end of 1996 demonstrate an historic accomplishment. Thousands of businesses have learned about the injustices faced by their employees who are denied equal compensation because of their relationship status and many have taken steps to correct this injustice. Dozens of insurance companies have begun offering a broader array of insurance plans to consumers. Unions have modified their benefits plans and policies, allowing their members equal access regardless of marital or domestic partnership status. Hundreds of thousands of employees are eligible for benefits that more closely reflect the reality of family life in today's society. And perhaps above all else, a City government has successfully demonstrated its expanding commitment to conducting business only with companies that do not discriminate.

APPENDIX A

Ten Largest Complying Companies

| <u>Name of Company</u> | <u>No. of Employees</u> |
|---------------------------|-------------------------|
| 1. Bank of America | 84,083 |
| 2. Hewlett-Packard | 65,000 |
| 3. Pacific Bell | 45,000 |
| 4. Wells Fargo Bank | 42,000 |
| 5. Xerox Corporation | 40,000 |
| 6. IKON Office Solutions | 35,000 |
| 7. Digital Equipment Corp | 26,000 |
| 8. SmithKline Beecham | 20,000 |
| 9. Danka Corporation | 15,000 |
| 10. Danka Office Imaging | 10,000 |