

The seal of the City and County of San Francisco is a large, circular emblem in the background. It features an eagle with spread wings at the top, a central shield with a figure holding a staff, and a banner at the bottom with the motto "EUREKA". The words "SEAL OF THE CITY AND COUNTY OF SAN FRANCISCO" are inscribed around the perimeter of the seal.

**THE EQUAL BENEFITS ORDINANCE**

**RESOURCE MATERIALS**

for

**Chapter 12B of the San Francisco Administrative Code**

**City and County of San Francisco**

**Human Rights Commission**

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**The San Francisco Human Rights Commission is available to assist contractors in their efforts to comply with the law. For more information, consultation, training, policy development, technical assistance and referral services, contact the Human Rights Commission at (415) 252-2500.**

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# HEALTH INSURANCE

## FACT SHEET

Adopting a medical insurance program that provides for the equal treatment of employees with spouses and employees with domestic partners is an important part of a City contractor's efforts to end discrimination in the workplace. Since most employers are seeking information on the extension of benefits to domestic partners, the information below is written with that focus. However, the concept of equal benefits applies mutually, and where domestic partner benefits exist, spousal benefits must be extended in order to provide equal benefits.

### ***How does the provision of equal health insurance benefits work?***

If an employer offers health insurance coverage to the spouses of its employees, in order to provide equal benefits, the employer must also offer health insurance coverage to the domestic partners of its employees. Where health insurance coverage is available for the children of employees' spouses (such as step children), such benefits must be extended to the children of employees' domestic partners.

### ***Can I offer different plans to spouses and domestic partners?***

To offer equal benefits to the spouses and domestic partners of employees, the benefits offered must be the same. For instance, if an employer gives the spouses of its employees the option to choose between an HMO plan or PPO plan, but only offers the HMO option to domestic partners, the provision of benefits would not be equal. Likewise, where dental and vision coverage is available to spouses, it also must be available to domestic partners.

### ***How will offering domestic partner benefits affect the cost of a benefits plan?***

Most employers and municipalities who have instituted domestic partner health insurance benefits have experienced minimal costs associated with the extension of benefits. The two factors that influence costs are the number of people who enroll and the impact they have on the plan's claim experience.

### **Enrollment**

Employers who have instituted domestic partner benefits have found that, on average, only 1% to 3% of their employees will actually apply for coverage for their domestic partners. It is believed that these low enrollment rates are due to a reluctance on the part of some employees to disclose their sexual orientation, as well as to the fact that many domestic partners already have coverage through their own employers. In addition, since federal and most state tax laws currently do not provide income tax exemptions for domestic partner coverage, the tax burden placed on the employee can deter the employee from electing domestic partner coverage.

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## Claims Experience

The experience of the employers and municipalities who have provided domestic partner health coverage is that claims filed by domestic partners tend to be *less costly* than those filed by spouses. There has been no evidence to support the concern that the cost of covering the health insurance claims of same-sex domestic partners will be higher because of a higher incidence of HIV disease. Instead, employers have found that the cost of covering same-sex domestic partners is no higher than coverage for the general population, which routinely receives treatment for heart disease, cancer and premature child births. In fact, because both same-sex and opposite-sex domestic partners tend to have fewer dependents than married couples, there are significantly lower maternity and dependent health care costs associated with their coverage.

### ***How hard is it to find insurance providers willing to offer domestic partner health insurance?***

In most areas of the country, it is easy for employers to find insurance providers willing to provide domestic partner health insurance. Now that actuarial data is available to demonstrate the absence of added risk, more providers have entered this market. The number of providers offering domestic partner coverage has increased dramatically since the Equal Benefits Ordinance went into effect. A searchable database of insurance providers offering domestic partner coverage is available on the Human Rights Commission's website ([www.sfgov.org/sfhumanrights](http://www.sfgov.org/sfhumanrights)).

### ***Is continuation coverage available to domestic partners?***

Yes. While the law governing the continuation of health insurance coverage for employees, their spouses and dependents does not require such coverage for domestic partners, there appears to be nothing in the law to prohibit the extension of continuation coverage to domestic partners. In order for an employer to eliminate discrimination in the provision of benefits, such coverage should be extended to domestic partners on the same basis, and at the same rates as is required for spouses and dependents.

### ***What about retiree health benefits?***

As with other health coverage, any retiree health benefits offered to an employee with a spouse must also be offered to an employee with a domestic partner. This includes the domestic partner's ability to continue benefits in the event the retired employee dies.

### ***Under a Cafeteria Plan, can a domestic partner be included as a "family member" for purposes of family status change rules?***

The family status change rules set out the various events affecting employees, their spouses or dependents, which allow the employee to make plan election changes. For example, if an employee's spouse loses his or her job, the spouse can be enrolled in the cafeteria plan's health benefits even outside the open enrollment period. Because these rules do not define spouse or dependent, it is unclear whether domestic partners may be included. However, in the absence of an Internal Revenue Service ruling on point, the employer may be allowed to make its own reasonable interpretation of who is "family" for purposes of the family status change rules.

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# PENSION PLAN

## FACT SHEET

Adopting a pension plan that provides for the equal treatment of employees with spouses and employees with domestic partners is an important part of a City contractor's efforts to end discrimination in the workplace. Since most employers are seeking information on the extension of benefits to domestic partners, the information below is written with that focus. However, the concept of equal benefits applies mutually, and where domestic partner benefits exist, spousal benefits must be extended in order to provide equal benefits.

### ***How does the provision of retirement benefits to employees with domestic partners work?***

If an employer's retirement plan(s) include spousal benefit provisions, in order to provide equal benefits, whenever legally possible the employer must also offer the same provisions to the domestic partners of its employees.

Some examples of spousal benefit provisions include benefits provided to the spouse upon the death of an active employee; benefits provided to the spouse upon the retirement of the employee, including various annuity options; and spousal consent requirements.

### ***Are there some instances where the law prevents an employer from providing equal benefits?***

Yes. In some instances the law governing retirement plans is very specific in limiting the action that the employer can take. For example, the law states that an employee's retirement benefits may only be assigned to an alternate payee under the direction of a qualified domestic relations order (QDRO). This law was written to protect spouses and dependents in the event of divorce. Unless a domestic partner can obtain a QDRO, an employer may not be able to provide equal benefits.

### ***What if providing equal benefits would jeopardize a retirement plan's tax-qualified status?***

City Contractors are not expected to take any action that would jeopardize their plan's tax-qualified status.

# TAXATION

## FACT SHEET

This Fact Sheet explains the basic tax issues employers should consider when implementing a domestic partner health benefits policy.

### ***What are the tax differences between health care benefits for spouses and domestic partners?***

When employers provide health care benefits for the spouse and/or dependents of their employees, the Internal Revenue Code allows the money paid by the employer for these benefits to be excluded from the employee's gross income. (See, Internal Revenue Code §§105, 106.) No such exclusion exists for benefits given to an employee for his or her domestic partner, or the dependents of a domestic partner. Therefore, the money paid by an employer for health care benefits for an employee's domestic partner and/or the dependents of a domestic partner is income that is taxable.

### ***Who is responsible for paying the tax?***

The employee is responsible for paying the tax on domestic partner benefits. To the extent the law requires the employer to withhold tax on the income paid to its employees, the tax on domestic partner benefits must also be withheld.

### ***How is the tax calculated?***

While there is no Internal Revenue Service (IRS) code specifically addressing this issue, private letter rulings issued by the IRS require that an employer withhold tax from their employees' income on the fair market value of the health benefit paid in excess of the amount paid by the employee for that benefit. For example, at XYZ Co., the cost of the health insurance premium for a domestic partner is \$50.00 per month. The employee pays \$30.00 of this premium, and the employer pays \$20.00. The fair market value to be included in the employee's gross income would be \$20.00, which equals the cost of the premium minus the amount paid by the employee. This is called *imputed income*. Where the premium rate is difficult to determine, for example where an employer is self-insured, the fair market value may be determined by using the COBRA rate minus any administrative fees.

### ***Can the tax on benefits given to domestic partners be avoided where a domestic partner is considered a dependent for purposes of the tax laws?***

Yes. A domestic partner may be considered a dependent for purposes of the tax laws governing employer-provided health care benefits if the domestic partner is recognized as a common-law spouse, or where the domestic partner meets the following criteria: (1) the domestic partner receives over 50% of his or her support from the taxpayer; (2) the domestic partner's principal place of abode is the taxpayer's home; and (3) the domestic partner is a member of the taxpayer's household. (Please note that a

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domestic partner cannot be a member of the taxpayer's household if the relationship is in violation of local law.) Where a domestic partner is considered a dependent, the money paid by the employer for health care benefits can be excluded from the employee's gross income.

***Can the tax on benefits given to children of domestic partners also be avoided?***

If the children of a domestic partner satisfy the requirements of being a dependent (as outlined above), the money paid by the employer for their health care benefits can be excluded from the employee's gross income. (This assumes that the domestic partner's children have not been adopted by the employee.)

***Are State tax laws applied in the same way?***

It depends. In some states, such as California, Connecticut, Massachusetts, New Jersey, Oregon, Rhode Island and Vermont, employee benefits provided to individuals in State-registered domestic partnerships, civil unions or same-sex marriages are given the same tax-exempt status as is provided to spouses.

***What about other taxes, such as FICA and FUTA?***

To the extent that the fair market value of domestic partner benefits is considered taxable as income, it also will be treated as wages subject to inclusion in Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) tax calculations.

***Can employers deduct the cost of providing domestic partner benefits along with other forms of employee compensation?***

Yes. The corporate tax deductions allowed for other benefit plans also are available to employers providing domestic partner benefits. This is because Internal Revenue Code section 162(a) allows employers to deduct all "ordinary and necessary business expenses" associated with employee compensation and does not specify to whom the benefit must be paid in order for the deduction to apply.

# TAX CONSEQUENCES

## SAMPLE POLICY

It is important to educate employees about the tax consequences of electing benefits coverage for their domestic partners. Employers seeking to do so may wish to include the following language in their employee manual or other materials distributed to employees making benefits elections:

*The IRS requires that any portion of the health insurance premium you pay for your domestic partner's health coverage or for the coverage of your domestic partner's dependent children must be taken from your paycheck on an after-tax basis. The IRS also requires that the amount your employer pays to cover your domestic partner or your domestic partner's dependent children be added (imputed) to your taxable wages. This means your taxable pay will be increased by the estimated cost of the domestic partner's coverage (minus the amount you pay in premiums). As a result, your taxable income will be higher than the actual (cash) wages you receive in your paycheck. **The amount of the imputed income can be substantial** and will vary by the plan you select and the number of dependents you cover.*

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# AFFIDAVIT OF DOMESTIC PARTNERSHIP

As long as a City contractor accepts as valid domestic partnerships registered with a governmental entity, a City contractor may also institute an internal domestic partnership registry. Instituting an internal domestic partner registry allows companies to offer equal access to domestic partner coverage to all its employees. This is especially true for companies with locations where no governmental domestic partner registries exist.

The City and County of San Francisco developed an affidavit for its registry that is based, in part, on the requests by insurance providers that certain criteria be included. The following sample affidavit is based upon the City's form:

*We declare under penalty of perjury:*

- 1. We have an intimate, committed relationship of mutual caring;*
- 2. We share the same principal residence(s);*
- 3. We agree to be responsible for each other's basic living expenses during our domestic partnership; we also agree that anyone who is owed these expenses can collect from either of us;*
- 4. We are both 18 or older;*
- 5. Neither of us is married;*
- 6. We are not so closely related by blood that legal marriage would otherwise be prohibited; and*
- 7. Neither of us has a different domestic partner now.*

*We declare under penalty of perjury under the laws of the State of \_\_\_\_\_ that the statements above are true and correct.*

*Signed on \_\_\_\_\_, 20\_\_\_\_ in \_\_\_\_\_*

*Signature \_\_\_\_\_ Print Name \_\_\_\_\_*

*Signed on \_\_\_\_\_, 20\_\_\_\_ in \_\_\_\_\_*

*Signature \_\_\_\_\_ Print Name \_\_\_\_\_*

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In addition to establishing an affidavit system for employees to register a domestic partnership, an employer with an internal registry may wish to set out conditions under which a domestic partnership will end. Among other administrative functions, this will allow an employee, under certain plan designs, to remove his or her domestic partner from a benefits plan at a time other than during open enrollment.

*A domestic partnership ends when:*

1. *One of the partners dies;*
2. *One of the partners sends the other a Notice for Ending a Domestic Partnership;*
3. *One of the partners gets married; or*
4. *The partners stop sharing the same principal residence(s).*

A sample Notice for Ending a Domestic Partnership follows:

1. *My name is* \_\_\_\_\_
2. *My Domestic Partnership with* \_\_\_\_\_  
*is over.*
3. *I sent a copy of this notice to my former domestic partner on* \_\_\_\_\_  
*I mailed the copy to:*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*I declare under penalty of perjury under the laws of the State of* \_\_\_\_\_ *that the statements above are true and correct.*

*Signed on* \_\_\_\_\_, 20\_\_ *in* \_\_\_\_\_

*Signature* \_\_\_\_\_ *Print Name* \_\_\_\_\_

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# BEREAVEMENT LEAVE

## SAMPLE POLICY

Adopting a bereavement leave policy that provides for equal treatment of employees with spouses and employees with domestic partners is an important part of a City contractor's efforts to end discrimination in the workplace.

This document offers sample policy language that includes employees with domestic partners in a bereavement leave policy. This means that when leave is granted because of the death of an employee's spouse or someone related to the spouse (such as a mother-in-law or father-in-law), leave must also be granted because of the death of an employee's domestic partner or someone similarly related to the domestic partner.

A sample bereavement leave policy follows:

*In the event of a death in an employee's immediate family, an employee may be granted up to five days of pay for bereavement leave to handle matters related to death and grieving. If additional time is needed, the employee may use accrued vacation or compensatory time and may request an unpaid leave of absence.*

*"Immediate family" includes the employee's spouse, domestic partner, parents (including step parents, foster parents, parents-in-law and domestic partner's parents), grandparents, siblings, children, children of a domestic partner, step child, adopted child, a child for whom the employee has parenting responsibilities, and a relative or friend who resides with the employee.*

In some situations, an employee will request bereavement leave because of the death of someone not covered by the categories listed above. In these situations, some employers use their own discretion to decide whether to allow leave to be taken. An example of discretionary language is:

*Bereavement Leave may also be granted because of the death of any other individual. A request for bereavement leave due to the death of any other individual should be submitted to the Human Resources Manager for approval.*

For employers who have never formalized their bereavement leave policy, this document also describes some of the different ways in which bereavement leave is offered.

Bereavement leave can be granted with or without pay. Some employers treat bereavement leave as a type of sick leave, paying employees taking leave with available accrued sick pay. Some employers pay employees for bereavement leave by

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applying other forms of accrued leave, such as personal leave or vacation pay. Bereavement leave also may be classified as a separate and unique type of leave for which pay will be given.

Regardless of how bereavement leave is categorized, some employers limit the number of days an employee may be absent from work on bereavement leave. Other employers use a policy that pays bereavement leave for a specified period of days but allows additional days of leave to be taken unpaid, or with pay through the use of accrued vacation or compensatory time. In addition, employers often limit the category of people whose death will entitle the employee to take bereavement leave.

# CONFIDENTIALITY

## SAMPLE POLICY

By instituting policies that include domestic partners, employers may begin to learn more about their employees' sexual orientation, especially when employees enroll their same-sex domestic partners for employee benefits, thereby disclosing their lesbian, gay or bisexual orientation. Because sexual orientation information can be misused in the workplace and lead to charges of discrimination, it is important that policies and procedures are put in place to maintain the confidentiality of this information.

The following is a sample policy addressing confidential employee information:

*Information gathered in the course of the administration of benefits will be respected as confidential and will be disclosed only as necessary in the course of the administration of benefits.*

Employers are encouraged to consider the following guidelines for employees with access to confidential information:

- *Information about an employee's sexual orientation should not be discussed except when required as part of the administration of benefits.*
- *If disclosure other than in the administration of benefits is necessary, the employee should be informed prior to disclosure.*
- *Information, memos, letters or reports that identify an employee's sexual orientation should not be left in open, public or uncontrolled areas.*

# FAMILY AND MEDICAL LEAVE

## SAMPLE POLICY

Adopting a Family and Medical Leave policy that provides for the equal treatment of employees with spouses and employees with domestic partners is an important part of a City contractor's efforts to end discrimination in the workplace.

The Federal Family and Medical Leave Act of 1993 (FMLA), and the California Family Rights Act of 1991, describe circumstances under which an employee may take a leave of absence from his or her job and be guaranteed the right to return to work. To comply with the nondiscrimination provisions required of City contractors, Family and Medical Leave must be extended equally to employees with spouses and employees with domestic partners.

Employers are required to notify their employees of the basic provisions of these laws. A sample Family and Medical Leave policy follows:

*Eligible employees may be granted Family and Medical Leave for the following reasons:*

- *To provide care for the employee's child or child of the employee's spouse or domestic partner following the child's birth, adoption, or foster care placement;*
- *To provide care for a spouse, domestic partner, child or parent of the employee, or child or parent of a spouse or domestic partner, who has a serious health condition;*
- *For a serious health condition that makes the employee unable to perform the functions of his/her position.*

### **More information on the Family and Medical Leave Act**

- Gives qualified employees up to 12 weeks of unpaid leave from work per 12 month period.
- Employees are eligible for leave if they have worked for their present employer for at least 12 months and have worked at least 1,250 hours for that employer during the previous 12 months.
- A serious health condition is defined as a physical or mental condition that involves inpatient care in a hospital, hospice, or residential care facility, or continuing treatment by a health care provider. An employer may request reasonable medical documentation of the serious health condition to verify whether an employee is eligible for leave.

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- Employers with 50 or more employees are covered by the law. An employer with multiple work sites is covered by the law so long as 50 or more employees work within seventy-five (75) miles of the employee requesting the leave.
- While employers with fewer than 50 employees are not required to provide leave, many do so on a voluntary basis.
- With few exceptions, an employee returning to work from a leave must be returned to the same position held when the leave began or to an equivalent position. An equivalent position is one with equal benefits, pay, and other terms and conditions of employment.
- An employee may maintain group health care coverage during the leave. The employer and the employee must each pay the portion of the health insurance premium that each paid prior to the leave.
- An employee may elect, or an employer may require, that an employee substitute available paid leave, such as sick leave, unused vacation or personal leave, for any part of the 12 weeks of unpaid leave.

# NONDISCRIMINATION IN EMPLOYMENT

## SAMPLE POLICY

Adopting a nondiscrimination policy that clearly prohibits discrimination against employees with spouses and employees with domestic partners is an important part of a City contractor's efforts to end discrimination in the workplace.

This document offers sample language that includes employees with domestic partners in a nondiscrimination policy. For employers who have never formalized their non-discrimination policy, this document also describes some of the elements of such a policy.

An employment nondiscrimination policy is one which establishes that employees and applicants for employment who are members of a protected group will be treated fairly and equally with respect to all aspects of employment. The law specifies which groups must be protected, and some employers only prohibit discrimination against those groups. Others recognize that all individual characteristics which are not job related should be omitted from employment decision-making. The Human Rights Commission recommends implementing a non-discrimination policy that combines these two approaches by first listing specific protected categories and then extending protection to all non-job-related factors.

*It is Company policy to provide equal opportunity in employment, development and advancement for all qualified persons without regard to age, ancestry, color, domestic partner status, gender identity (transgender status), HIV status, marital status, medical condition, national origin, physical or mental disability, race, religion, sex, sexual orientation, veteran status, or any other non-job-related factor. This policy applies to every aspect of employment, including, but not limited to: hiring, advancement, transfer, demotion, lay-off, termination, compensation, benefits, training and working conditions. It is also Company policy to provide equal benefits to employees with spouses and employees with domestic partners.*

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