



**Rules of Procedure
for the
Nondiscrimination in Contracts:
Equal Benefits Provisions
of**

Chapter 12B of the San Francisco Administrative Code

City and County of San Francisco

Human Rights Commission

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I. PURPOSE

To articulate guidelines for implementing the provisions of Chapter 12B of the San Francisco Administrative Code prohibiting City Contractors from discriminating in the provision of benefits to employees with spouses and employees with domestic partners and to the spouses and domestic partners of employees. To create a flexible implementation plan designed to provide guidance to entities seeking to comply with the law.

II. DEFINITIONS

A. Benefits

“Benefits” means any plan, program or policy provided by a City Contractor to its employees as part of the employer’s total compensation package. This includes, but is not limited to, the following types of benefits: retirement plans; medical, dental and vision plans; bereavement, family medical, parental and other leave policies; disability and life insurance plans; employee assistance programs; discounts; access to facilities, services and events; travel and relocation expenses; incentive, stock option, and profit sharing plans and other compensation programs.

B. Cash Equivalent

“Cash Equivalent” means the amount of money paid to an employee by a City Contractor who, despite taking all reasonable measures, is unable to end discrimination in benefits. The cash equivalent shall be the amount of money paid by the City Contractor for the benefit given to a similarly situated employee.¹ To the extent that a City Contractor limits the availability of any benefit to the spouses of employees, or vice versa, the availability of a cash equivalent may be similarly limited.² The cash equivalent payment shall be made either on the same schedule as the City Contractor uses for the benefit given to employees

¹ The following scenario is provided as an example of similarly situated employees: A City Contractor with locations in Dallas, TX and Bridgeport, CT, offers spousal health insurance to its employees. After taking all reasonable measures, the City Contractor is still unable to provide health insurance for the domestic partners of its employees. The cash equivalent the City Contractor would pay to its Bridgeport employees would be the amount of money paid by the City Contractor for benefits given to employees with spouses in Bridgeport; the cash equivalent the City Contractor would pay to its Dallas employees would be the amount of money paid by the City Contractor for benefits given to employees with spouses in Dallas.

² The following scenario is provided as an example of limiting the availability of a cash equivalent: A City Contractor limits the availability of spousal health insurance coverage to only those spouses who are not already covered by their own employer’s health insurance plan. This City Contractor is unable to provide health insurance to the domestic partners of its employees and instead offers a cash equivalent. The City Contractor may limit the availability of a cash equivalent payment to only those employees whose domestic partners are not already covered by their own employer’s health insurance plan.

with spouses, or, if no such schedule exists, on another schedule so long as such payment is made no less than once per month. No cash equivalent payment will be required where making such a payment would violate federal or state law.

C. City Contractor

“City Contractor” means any person or persons, firm, partnership, corporation, or combination thereof, who submits a bid and/or enters into a contract with department heads and officers empowered by law to enter into contracts on the part of the City and County for public works or improvements to be performed, or 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 or to be paid out of moneys deposited in the treasury or out of trust moneys under the control or collected by the City and County.

D. Director

“Director” means the Director of the City and County of San Francisco Human Rights Commission, or the Director’s designee.

E. Nondiscrimination in Benefits

“Nondiscrimination in Benefits” means the equality of benefits between employees with spouses and employees with domestic partners, between spouses of employees and domestic partners of employees, and between dependents and family members of spouses and dependents and family members of domestic partners.

1. A City Contractor will not be deemed to be discriminating in the provision of benefits where the implementation of policies ending discrimination in benefits is delayed following the first award of a City contract to a City Contractor after June 1, 1997:
 - (a) until the first effective date after the first open enrollment process following the date the contract with the City and County begins, provided that the City Contractor submits to the Human Rights Commission evidence that reasonable efforts are being undertaken to end discrimination in benefits. This delay may not exceed two years from the date the contract with the City is entered into, and only applies to benefits for which an open enrollment process is applicable.³

³ For purposes of this provision, the term “effective date” refers to the date upon which the next benefits plan year begins; the term “open enrollment period” refers to the time when employees are eligible to enroll themselves or others in the City Contractor’s benefits plan; the term “open enrollment process” begins when the City Contractor starts planning for, and negotiating with its insurance provider(s) regarding, the benefits to be offered during the next benefits plan year, and ends at the next effective date.

- (b) until administrative steps can be taken to incorporate nondiscrimination in benefits into the City Contractor's infrastructure. The time allotted for these administrative steps shall apply only to those benefits for which administrative steps are necessary and may not exceed 3 months. An extension of this time may be granted at the discretion of the Director upon the written request of the City Contractor.
- (c) until the expiration of a City Contractor's current collective bargaining agreement(s) where all of the following conditions have been met:
 - (i) the provision of benefits is governed by one or more collective bargaining agreement(s); and
 - (ii) the City Contractor takes all reasonable measures to end discrimination in benefits by either requesting that the Union(s) involved agree to reopen the agreement(s) in order for the City Contractor to take whatever steps necessary to end discrimination in benefits or by ending discrimination in benefits without reopening the collective bargaining agreement(s); and
 - (iii) in the event that the City Contractor cannot end discrimination in benefits despite taking all reasonable measures to do so, the City Contractor provides a cash equivalent to eligible employees for whom benefits are not available. Unless otherwise authorized, in writing by the Director, this cash equivalent payment must begin at the time the Union(s) refuse to allow the collective bargaining agreement(s) to be reopened, or in any case no longer than three (3) months from of the date the contract with the City is entered into. This cash equivalent payment shall not be required where it is prohibited by federal labor law.

2. A City Contractor will not be deemed to be discriminating in the provision of benefits where, after taking all reasonable measures, the City Contractor is unable to end discrimination in benefits and instead provides the closest approximation of equal benefits available. If the cost of providing the closest approximation of equal benefits is at least 33% less expensive than the cost of providing equal benefits, the City Contractor must also make a cash equivalent payment.⁴

⁴ The following scenario is provided as an example of this provision: A City Contractor provides health insurance coverage for the spouses of its employees under Plan A. Plan A is unwilling to cover the domestic partners of employees. Plan B will provide coverage to domestic partners of employees, but is not as good as Plan A because there is a higher deductible and no prescription coverage. The City Contractor pays \$100 toward the premium for spousal coverage under Plan A. Because Plan B is less expensive, the City Contractor pays \$67 toward the premium for domestic partner coverage under Plan B, which is 33% less than the amount paid under Plan A. In order to not discriminate in the provision of benefits, the City Contractor must provide a cash equivalent of \$33 to those employees who elect coverage for their domestic partners under Plan B.

3. So long as a City Contractor does not discriminate in the provision of benefits between employees with spouses and employees with domestic partners, a City Contractor may:
 - (a) elect to provide benefits to individuals in addition to employees' spouses and employees' domestic partners;
 - (b) allow each employee to designate a legally domiciled member of the employee's household as being eligible for spousal equivalent benefits;⁵
 - (c) provide benefits neither to employees' spouses nor to employees' domestic partners.

III. REASONABLE MEASURES

The Director will determine whether a City Contractor has taken all reasonable measures upon the review of HRC Form 12B-102 and attached compelling documentation provided by the City Contractor that demonstrates that it is not possible for the City Contractor to end discrimination in benefits. A determination that it is not possible for the City Contractor to end discrimination in benefits shall be based upon a consideration of such factors as:

- A. The number of benefits providers identified and contacted, in writing, by the City Contractor, and written documentation from these providers that they will not provide equal benefits;
- B. The existence of benefits providers willing to offer equal benefits to the City Contractor; and
- C. The existence of federal or state laws which preclude the City Contractor from ending discrimination in benefits.

IV. JURISDICTION

A. Subcontractors

The nondiscrimination in benefits requirements do not apply to subcontractors.

⁵ Under this provision a City Contractor may elect to provide benefits on a basis unrelated to both marital status and domestic partner status.

B. Location

1. The nondiscrimination in benefits requirements apply to a Contractor in all of its 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 if the Contractor's presence at that location is connected to a contract or property contract with the City; and
 - (c) elsewhere in the United States where work relating to a City contract or property contract is being performed.
2. Nothing in this section shall preclude a Contractor from ending discrimination in benefits throughout its U.S. operations. The Human Rights Commission encourages Contractors to end discrimination in benefits throughout their U.S. operations and commends Contractors that do so. Where a Contractor has ended discrimination in benefits throughout its operations in the U.S., a determination of compliance shall be applicable to all of the Contractor's activity with the City and it shall not be necessary for an evaluation of compliance to occur before each potential contract.
3. Where a Contractor declines to end discrimination in benefits throughout the Contractor's operations in the U.S., the Director shall determine where compliance is required before the Contractor enters into each individual contract.
 - (a) The determination of where compliance is required shall be based upon a consideration of factors which include but are not limited to:
 - (i) the nature of the work being performed in locations other than in San Francisco;
 - (ii) the degree of connection between the contract at issue and the work being performed in locations other than in San Francisco;
 - (iii) the percentage of the overall work mandated under the contract which is being performed by the Contractor in a location other than in San Francisco;
 - (iv) the amount of contact and communication that persons performing work in locations other than in San Francisco have with other persons performing work related to the contract;
 - (b) For the purpose of this section, the phrase "in San Francisco" shall include real property described in sections IV.B(1)(a) and (b).

C. Covered Entity

The entity which enters into a contract with the City is the entity which must comply with the ordinance. Separate corporate entities, including parents and subsidiaries of the entity which contracts with the City, are not required to comply with the ordinance. In the case of a joint venture, all joint venture partners will be required to comply. The Director will examine the corporate structure of the entity to determine whether it has been created for separate, independent and legitimate business reasons, and not for the purpose of avoiding the ordinance. The factors to be considered in this determination may include but are not limited to: (a) the legal structure of the entity; (b) the degree of control the entity exercises over the provision of benefits; (c) the date the entity was formed; and (d) the role within the entity of the person signing the contract.

D. Covered Benefits

A Contractor must end discrimination in all benefits offered to spouses or domestic partners of employees and in all benefits offered to employees because they have a spouse or domestic partner. Where a Contractor demonstrates that, with respect to a particular contract, the City is exercising more power in the marketplace than an ordinary consumer of the goods, services or interest in real property at issue in the contract, then the Contractor may limit the benefits offered on a nondiscriminatory basis to exclude those benefits provided by an ERISA-sponsored benefits plan.⁶ It is the Contractor's responsibility to raise this issue with the Human Rights Commission and to submit documentation to the Human Rights Commission that supports its claim of limited application. The Human Rights Commission will provide a form for this purpose. The Director shall make the final determination as to which benefits must be offered on a nondiscriminatory basis. This determination shall be required before the Contractor enters into each individual contract.

V. EXCEPTIONS AND WAIVERS

A. Exceptions and Waivers Requiring HRC Action

In accordance with the terms and conditions expressed in Chapter 12B.5-1, after encouraging a non-compliant prospective contractor to comply with Chapter 12B, a contracting City department or commission may request a waiver of the requirements of the Chapter where:

⁶The term "ERISA" refers to the Employee Retirement Income Security Act of 1974. For purposes of this section, "benefits provided by an ERISA-sponsored benefits plan" shall mean benefits provided under employee welfare plans (such as medical insurance) and employee pension plans. This term shall not include other benefits such as bereavement leave, family leave, employee assistance programs, company discounts and others, unless the Contractor can show that such benefits are provided through a plan that is covered by ERISA.

1. there is only one prospective contractor willing to enter into a contract or property contract with the City, or the prospective contractor is a sole source provider of the needed goods or services, or interest in real property;
2. an emergency is declared by the contracting authority and there are no prospective contractors in compliance with Chapter 12B who can perform the work necessary to end the emergency;
3. the City Attorney certifies in writing that specialized litigation requirements mandate the use of the prospective contractor;
4. the prospective contractor is a public entity that can provide the City with goods, services or an interest in real property of a quality or accessibility that is not available from another source, or that the contract or property contract is necessary to serve a substantial public interest;
5. there are no qualified responsive bidders or prospective contractors who are in compliance and the contract is essential to the City or City residents;
6. the contract is pursuant to bulk purchasing arrangements through federal, State or regional entities which actually reduce the City's purchasing costs; and
7. applying the requirements of this Chapter would result in the City's entering into a contract with an entity that was set up, or is being used, for the purpose of evading the intent of this Chapter.

B. Other Exceptions and Waivers

1. In accordance with the terms and conditions expressed in Chapter 12B.5-1, contracting City departments or commissions may waive the requirements of the Chapter where:
 - (a) the requirements of this Chapter will violate or are inconsistent with the terms of a grant or agreement with a public agency, so long as the contracting officer has tried to change the terms to authorize application of this Chapter;
 - (b) the General Manager of the Public Utilities Commission finds that the contractor is providing, conveying or transmitting wholesale or bulk water, power or natural gas, to or on behalf of the San Francisco Public Utilities Commission, where such transaction cannot be accomplished through the City's standard competitive bidding procedures.

2. This Chapter shall not apply to:
 - (a) the investment of trust moneys or agreements relating to the management of trust assets;
 - (b) City moneys invested in U.S. government securities or under pre-existing investment agreements;
 - (c) the investment of City moneys where the Treasurer finds that no compliant entity is capable of performing the desired transactions or the City would incur a financial loss in violation of the Treasurer's fiduciary duty.
3. Nothing in Chapter 12B.5-1(d) shall limit the right of the Board of Supervisors to waive the provisions of this Chapter.
4. A potential contractor may request that a contracting department seek an exception pursuant to Chapter 12B.5-1(d). To make such a request, the potential contractor must complete the necessary HRC Form(s) and submit the Form(s) to the contracting department. If a contracting department requests approval for a waiver based upon a request made by a potential contractor, the contracting department must submit a copy of the potential contractor's completed HRC Form(s) with the contracting City department or commission's documentation.

C. Additional Requirements

In addition to the requirements of Chapter 12B.5-1, where a contracting City department or commission seeks to exercise its waiver authority or to obtain the approval of a waiver from the Director, the contracting department or commission must:

1. explain to the prospective contractor the nondiscrimination in benefits requirements of Chapter 12B;
2. agree to construct the contract for the shortest reasonable duration in light of all applicable circumstances; and
3. attempt to award any future contracts for the needed goods or services to a contractor that does not discriminate in the provision of benefits by developing contacts with other providers who do comply with the nondiscrimination in benefits requirements of Chapter 12B and/or by assisting the sole source provider with full compliance with the nondiscrimination in benefits requirements of Chapter 12B.

VI. EFFECTIVE DATE

The nondiscrimination in benefits provisions shall not apply to any contracts, or other agreements involving real or personal property, executed or amended prior to June 1, 1997, or to bid packages advertised and made available to the public, or any competitive or sealed bids received by the City, prior to June 1, 1997, unless and until such contracts or property contracts are amended after June 1, 1997, and would otherwise be subject to this Chapter.

VII. OTHER ISSUES

A. Internal Domestic Partnership Registry

In addition to recognizing as valid domestic partnerships registered in accordance with the provisions of Chapter 12B of the San Francisco Administrative Code, a City Contractor may institute an internal domestic partnership registry to allow for the provision of equal benefits to employees with domestic partnerships who do not register their partnerships pursuant to a governmental body authorizing such registration, or who are located in a jurisdiction where no such governmental domestic partnership registry exists. In such cases, the Human Rights Commission encourages City Contractors to do so.⁷

B. Verification of Domestic Partnership or Marriage

A City Contractor may verify the existence of a domestic partnership or marriage to the extent such verification is undertaken equally for employees with domestic partners and employees with spouses.

C. Excess Costs

In the event that the actual cost of providing a certain benefit to an employee with a domestic partner or an employee's domestic partner exceeds that of providing the benefit to an employee with a spouse or to an employee's spouse, or vice versa, the City Contractor may condition nondiscrimination in benefits upon the employee agreeing to pay the excess costs. The excess costs the City Contractor may pass on to the employee may include only the actual costs of the benefit for that employee and may not include implementation or administrative costs, any tax consequence to the employer, or additional costs to other employees.

⁷ Sample language for an internal domestic partnership registry is available through the Human Rights Commission.

D. Taxation

1. The withholding of income tax from an employee for income associated with the provision of benefits is permissible to the extent the taxation is required by state or federal law.
2. Nothing in these rules is intended to require a City Contractor to take any action that would jeopardize the tax-qualified status of a retirement plan.

E. Notification

Notification by a City Contractor to its employees regarding the provision of benefits to employees with spouses and employees with domestic partners must be conducted so that all employees are given equal notice of all available benefits.

F. Continuation Coverage

The continuation of benefits, including health benefits, should be provided equally to the spouses of employees and the domestic partners of employees, except where otherwise prohibited by law.