Comments

NONDISCRIMINATION ORDINANCE 101

SAN FRANCISCO'S NONDISCRIMINATION IN CITY CONTRACTS AND BENEFITS ORDINANCE: A NEW APPROACH TO WINNING DOMESTIC PARTNERSHIP BENEFITS

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In our communities, at work, in government, and in the media, lesbians and gays are more visible than ever before.1 This increased visibility reflects the fact that many Americans now live in families comprised of or headed by lesbian or gay couples.2 In spite of this reality, homosexual couples are denied most of the legal benefits that heterosexual couples obtain through marriage licenses.3 This Comment focuses on the San Francisco Nondiscrimination in City Contracts and Benefits Ordinance as a strategy for lesbians and gays to win one of the most important benefits of marriage—spousal employment benefits. Part I describes the experiences of employers who offer domestic partnership benefits. Part II describes the original version of the San Francisco Nondiscrimination in


1. For an account of how lesbians and gay men are challenging the traditional notion of family in the workplace, see Steven N. Hargrove, Domestic Partnerships Benefits: Redefining Family in the Workplace, LOY. CONSUMER L. REP., Winter 1994, at 49.

2. See id.

3. The many benefits of marriage include immigration rights, property rights, tax benefits, and employment benefits such as “partner insurance coverage, pension survivorship plans, and sick and bereavement leave.” Philip S. Horne, Challenging Public- and Private-Sector Benefit Schemes Which Discriminate Against Unmarried Opposite-Sex and Same-Sex Partners, 4 LAW & SEXUALITY 35, 48 (1994) (citation omitted). Unmarried partners are also denied a variety of discounts including “family discounts offered by airlines and insurance companies and credit disbursement programs offered by banks.” Id.
City Contracts Ordinance. Part III introduces legal challenges to that
original draft; including analysis of the broad policy issues involved. Part
IV reviews the decision in Air Transport Association v. City & County of
San Francisco.4 Part V compares the effectiveness of the San Francisco
Ordinance to other strategies for winning domestic partnership benefits,
and Part VI concludes with a discussion of the effectiveness of the San
Francisco strategy.

I. EXPERIENCE OF EMPLOYERS ALREADY OFFERING DOMESTIC
PARTNERSHIP BENEFITS

Some people find it surprising that employers can offer domestic
partnership benefits, including health insurance, to employees at a minimal
expense. The percentage of employees taking advantage of these benefits
is likely to be low, especially if the benefits are extended only to couples
who may not legally marry (i.e. homosexual couples). According to one
survey, "only between 1 and 3 percent of employees typically opted for the
benefits, most of them heterosexual couples. Homosexual pairs are more
likely to have separate jobs and thus benefits from their own employers."5
Further, some lesbian and gay employees may forego the benefits because
they "fear coming out openly as gay in order to take advantage of the
benefit."6

Concerns about lesbian and gay health issues may be another
hindrance to offering health insurance to domestic partners. Some
employers may be wary of offering the benefits in part because of concern
about "the high cost of AIDS. Many employers feel that by offering
domestic partnership benefits, a large number of gay partners with AIDS
will be added to health insurance policies."7 However, "the incidents of
AIDS within the gay community are leveling off, whereas the number of
cases within the heterosexual population continues to increase."8 In
addition, the treatment of AIDS is comparable to, or less costly than,
treatment of many other diseases.9 The San Francisco Human Rights
Commission also points out that "because same-sex... domestic partners
typically have fewer dependents than married couples, there are

4. 992 F. Supp. 1149 (N.D. Cal. 1998) [hereinafter Air Transport 1].
5. Vincent J. Schodolski, United Up in Air over Domestic Partner Push, CHI. TRIB.,
California consulting firm).
6. Jeffrey Leib, Same-Sex Benefits Cost Little; Few Recriminations or Added Expense,
HOUSTON CHRON., Aug. 10, 1997, at Bus. 1 (quoting Sue Anderson, executive director of
Equality Colorado, a lesbian and gay rights organization).
7. Hargrove, supra note 1, at 53.
8. Id.
9. See id.
significantly lower maternity and dependent health care costs associated with their coverage.”

Furthermore, a large number of insurance companies offer policies designed to cover same-sex domestic partners.

Many employers already offer spousal employment benefits to unmarried domestic partners. Indeed, in some areas the benefits have become so commonplace that employers fear losing top recruits if they do not offer the benefits. Some companies mention their domestic partnership benefits in efforts to recruit new employees. For example, Coors Brewing Company, which began offering benefits in 1995, touts the policy as a “good reason to come work at the Golden, Colo., brewery.” Companies may also offer benefits to “keep talent in house. Especially in the computer and entertainment industries, it comes down to the issue of employee retention.” While the boycott of Disney by Southern Baptists reveals that a small number of companies may lose money due to boycotts, they may earn more money by garnering the loyalty of gay and lesbian consumers and by receiving the benefits of organized efforts to support boycotted companies. In addition to private employers, many local

10. Leib, supra note 6, at Bus. 1 (citation omitted).


12. Employers offering health insurance benefits to domestic partners include Coors Brewing Company, Shell, American Express, Barnes & Noble, Chevron, Walt Disney, Eastman Kodak, and Microsoft. See Leib, supra note 6, at Bus. 1; see also Bettina Boxall, A New Era Set to Begin in Benefits for Gay Couples, L.A. TIMES, July 7, 1997, at A3 (citing a “recent survey by the accounting firm of KPMG [which] indicates that nearly a quarter of employers nationwide with more than 5,000 workers provide health benefits to nontraditional partners . . .”).

13. See, e.g., Ann Davis, “And What About Domestic Partners?”, NAT’L L.J., June 5, 1995, at A6 (noting that the prominent New York law firms offering domestic partnership benefits include Davis, Polk & Wardwell; Debevoise & Plimpton; Milbank, Tweed, Hadley & McCloy; Paul, Weiss, Rifkind, Wharton & Garrison; Shearman & Sterling; Wachtell, Lipton, Rosen & Katz; and White & Case).

14. Leib, supra note 6, at Bus. 1.

15. Id. (quoting Howard Tharsing, a San Francisco financial adviser) (citation omitted).

16. See, e.g., Rebecca Cantwell, Same-Sex Benefits at US West; Supporters Say Time Is Right for the Change, ROCKY MOUNTAIN NEWS, Aug. 16, 1997, at 1B (describing how US West hopes to appeal to gay consumers by offering domestic partnership benefits).

governments offer health insurance to the same-sex domestic partners of employees. 18

II. THE SAN FRANCISCO NONDISCRIMINATION IN CITY CONTRACTS AND BENEFITS ORDINANCE

In an effort to secure domestic partnership benefits for more of its citizens, the governing body of San Francisco, California, the San Francisco Board of Supervisors ("the City"), passed the Nondiscrimination in City Contracts and Benefits Ordinance ("the Ordinance"). The Ordinance was passed in November 1996 and became effective June 1, 1997. 19 The Ordinance provides in part:

No contracting agency of the City, or any department thereof, acting for or on behalf of the City and County, shall execute or amend any contract . . . with any contractor that discriminates in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits as well as any benefits other than bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration. 20

In short, the Ordinance requires all contractors doing business with the City to offer equivalent benefits to spouses of married employees and registered domestic partners of unmarried employees. 21 As the Ordinance is the first of its kind in the United States, 22 it is the first implementation of a new strategy for winning domestic partner employee benefits.

As originally drafted, the Ordinance would have a substantial impact beyond San Francisco. The law requires any company doing business with the City to offer employee benefits to all registered domestic partners of

18. These include San Francisco, Berkeley, West Hollywood, and Santa Cruz, California; Ann Arbor and East Lansing, Michigan; Boston and Cambridge, Massachusetts; Seattle, Washington; Minneapolis, Minnesota; New York, New York; Washington, D.C.; and Travis County, Texas. See Hargrove, supra note 1, at 50.


21. See infra text accompanying notes 33-35 for exceptions to this policy.

employees throughout the United States.\(^{23}\) Thus, under the Ordinance, a major corporation conducting only a small fraction of its business with the City of San Francisco must offer domestic partner benefits to all of its U.S. employees in order to continue to do business with the City. The Ordinance could thus lead to many employees winning benefits in locations outside of San Francisco.

The Ordinance is also significant in that it affords tangible benefits to domestic partnership registration. Denied the opportunity to marry, lesbians and gays do have the opportunity to register as domestic partners with local governments that provide for such registration.\(^{24}\) "The law defines a domestic partner to be any person who has registered a domestic partnership with a governmental body pursuant to state or local law."\(^{25}\) In addition, "[t]he Human Rights Commission has developed a list of government-sponsored domestic partner registries."\(^{26}\) Though the Ordinance only requires that companies offer the benefit to "registered" domestic partners, "[m]any companies have developed an internal mechanism (usually an affidavit) for identifying domestic partnerships."\(^{27}\) The San Francisco Ordinance does not require such a proactive response from employers; "[t]o comply with the non-discrimination requirements of the law, a contractor should only seek to verify domestic partnerships to the same extent it seeks to verify marriages. If verification is desired, employees could be asked to produce a copy of their marriage license or domestic partnership certificate."\(^{28}\) Some jurisdictions also allow


\[^{24}\text{Though many domestic partner registries require that both domestic partners reside in the jurisdiction of the registry, some do not make this requirement. See San Francisco Human Rights Commission, Nondiscrimination in City Contracts—Domestic Partners: Frequently Asked Questions (visited Oct. 19, 1998) <http://www.sfhumanrights.org/lgbth/domparfaq.htm> [hereinafter Frequently Asked Questions]. Therefore, a couple may not have to reside in a jurisdiction that recognizes domestic partners to take advantage of the San Francisco Ordinance. See id.}\]

\[^{25}\text{Id.}\]


\[^{27}\text{Frequently Asked Questions, supra note 24; see also Leib, supra note 6, at Bus. 1 (noting that Coors Brewing Company "requires that employees who want health coverage for same-sex partners sign an affidavit that they have lived together for at least a year").}\]

\[^{28}\text{See Frequently Asked Questions, supra note 24.}\]
heterosexual couples to register as domestic partners. The San Francisco Ordinance applies to heterosexual as well as same-sex partnerships.\textsuperscript{29}

In order to make a bid on a contract with the City, a contractor must submit a Substantial Compliance Authorization Form\textsuperscript{30} which must indicate when nondiscriminatory benefits will be available.\textsuperscript{31} The Ordinance permits only a three-month period for the administrative steps necessary to implement the benefits.\textsuperscript{32}

There are a few limited exceptions to the employee benefits requirement. First, the Sole Source Exception provides that the City may accept a bid from a company that is the “sole source available to provide the City with the needed goods or services.”\textsuperscript{33} Second, the City may accept a bid from a contractor when “the contract is necessary to respond to an emergency which endangers the public health or safety” and “no entity that complies with the nondiscrimination in benefits requirements of Chapter 12B capable of performing the emergency work is immediately available.”\textsuperscript{34} Finally, a company that has “taken all reasonable measures to end discrimination in benefits” and “is unable to do so” may instead “offer a cash equivalent to employees for whom equal benefits are not available.”\textsuperscript{35}

III. THE CHALLENGES TO THE SAN FRANCISCO ORDINANCE

A. The Air Transport Association/United Airlines Challenge

The San Francisco Ordinance has met with some significant opposition. The most high-profile challenge has come from United Airlines (“United”), which was in the process of negotiating new leases with the City at San Francisco International Airport when the City enacted

\textsuperscript{29} See id.
\textsuperscript{31} See Form, supra note 30. “An extension of this time may be granted at the discretion of the Director of the Human Rights Commission or the Director’s designee upon the written request of the City Contractor.” Id.
\textsuperscript{32} See id.
\textsuperscript{33} Rules of Procedure, supra note 23.
\textsuperscript{34} Id.
the Ordinance.\textsuperscript{36} The airline balked at the prospect of offering domestic partnership benefits to all of its employees as a condition of signing the lease.\textsuperscript{37} On behalf of United and other carriers operating in San Francisco, the Air Transport Association ("ATA"), the trade organization for the nation's major airlines, and the Airline Industrial Relations Conference, an industry lobby group, sued the City in federal district court in May 1997.\textsuperscript{38} The suit was heard in October 1997,\textsuperscript{39} and the court handed down a decision on April 10, 1998.\textsuperscript{40} United, dissatisfied with the court's decision, failed to close a deal on the leases with the City.\textsuperscript{41} In an effort to avoid eviction from the airport, the airline again filed suit in the federal district court in Oakland.\textsuperscript{42} However, on May 27, 1999, the court affirmed its earlier decision, saying that United had to offer non-ERISA benefits to some employees.\textsuperscript{43} On July 30, 1999, United changed its policy and promised to offer a full range of same-sex domestic partnership benefits, but the lawsuit continues and may even end in the U.S. Supreme Court.\textsuperscript{44}

B. The ACLJ Challenge

In addition to the ATA and United suits, the Ordinance faces a less publicized legal challenge. The American Center for Law and Justice ("ACLJ") filed suit in a U.S. district court on behalf of S.D. Myers, Inc. ("SDMI"), an Ohio-based electrical maintenance company. SDMI said that if it "gave health insurance to unmarried partners of employees, [SDMI] would be approving of a lifestyle that God has said we are not to approve of."\textsuperscript{45} The ACLJ likewise espouses a fundamentalist Christian perspective and actively fights gay rights measures around the country.\textsuperscript{46} According to

\textsuperscript{36} See Schodolski, supra note 5, at Bus. 1. United is the largest private employer in the San Francisco metropolitan area, with about 20,000 local employees. See id.
\textsuperscript{37} See Leib, supra note 6, at Bus. 1.
\textsuperscript{38} See id.
\textsuperscript{40} For the specifics of the decision, see infra Part IV.
\textsuperscript{42} See id.
\textsuperscript{44} See Rachel Gordon, Focus Shifts in Domestic Partner Law, S.F. EXAMINER, Aug. 8, 1999, at D1.
\textsuperscript{46} For example, the ACLJ declared on an update to its web page that it has "just obtained a great victory in Hawaii as the State Legislature overwhelmingly approved a constitutional amendment which would ban same-sex marriages! [The ACLJ] worked
the ACLJ, "[i]n a very real way, opening up [an] office in San Francisco is like entering the enemy’s territory. After all, it was San Francisco Mayor Willie Brown that recently sponsored a gay and lesbian wedding ceremony at City Hall. But after much prayer . . . [it was decided to] establish[] [the] office." On May 27, 1999, the court rendered its decision, rejecting all of the ACLJ’s arguments.

C. Other Challenges to the Ordinance

Two nonprofit organizations also have opposed the Ordinance. Catholic Charities at first objected to giving domestic partnership benefits to its employees, but eventually agreed to extend the benefits following a legal battle. The Salvation Army also opposed the Ordinance and pulled out of a $3.5 million city contract to provide shelter for the homeless and meals for senior citizens.

The two disputes with charities were cited as the catalyst for action in the U.S. House of Representatives to punish San Francisco for passing the Ordinance. Representative Frank Riggs (R-Cal.) sponsored an amendment to a federal spending bill to prevent San Francisco from spending any part of $260 million in federal housing money to implement the Ordinance. The denied funds included rent subsidies for low-income families. Riggs said:

I just thought, “My goodness, has political correctness gotten to the point where we’re going to deny services to the homeless and to AIDS patients?” Somebody ought to stand up and say they think this is wrong, and you’re not going to use federal funding to accomplish this purpose.

While “virtually no one” in the House rose to defend the legislation closely with . . . various Hawaii legislators in order to ensure that an amendment protecting the family would be approved.” ACLJ, Center Makes Bold Move: Newest Office Faces Heavy Legal Action (visited Oct. 19, 1998) <http://www.aclj.org/CN0797.html>.

47. Id.

48. See S.D. Myers, 1999 U.S. Dist. LEXIS 8748, at *41. The court rejected, among other arguments, the plaintiff’s contention that the Ordinance contradicted state marriage laws. See id. at *12.


50. See id.

51. See id.


53. See ASSOCIATED PRESS, supra note 49.

54. Id.; see also Katharine Q. Seelye, Gay Policy in San Francisco Draws Penalty in the House, N.Y. TIMES, July 30, 1998, at A18 (stating that according to Mr. Riggs, the San Francisco Ordinance was motivated by a “morally objectionable policy” that “wrongly elevated unmarried homosexuals to the same status as married heterosexuals”)

55. "Gay policy in San Francisco draws penalty in the House," N.Y. TIMES, July 30, 1998, at A18 (stating that according to Mr. Riggs, the San Francisco Ordinance was motivated by a “morally objectionable policy” that “wrongly elevated unmarried homosexuals to the same status as married heterosexuals")
besides Mr. Riggs, the House passed it by a vote of 214 to 212 on July 29, 1998.\textsuperscript{55} Opponents of the legislation were "aghast."\textsuperscript{56} Representative Patrick Kennedy (D-R.I.) called the amendment "mean-spirited, bigoted, bigoted"; Representative Tom Lantos (D-Cal.) said the amendment was "a poorly disguised assault on a persecuted minority";\textsuperscript{57} and San Francisco Supervisor Leslie Katz responded, "San Francisco has done something so monumental that extremists are going to extremes to dismantle it."\textsuperscript{58} While the Senate did not take action on the amendment before the 105th Congress expired, this amendment illustrates the national impact of the Ordinance and highlights the fact that it comes at a time of increased intensity in the national debate over lesbian and gay rights.\textsuperscript{59}

\textit{D. The Opponents’ Basic Policy Arguments}\textsuperscript{60}

At the heart of their claims, the ATA and United object to a local government interfering with employment policies. United maintains that the case is "about whether or not a local government can dictate the employee policies of a company engaged in interstate commerce. . . . The airlines can’t be subjected to the whims of local politicians."\textsuperscript{61} The ATA adds that it has "nothing against the concept of domestic partners benefits per se, 'but what we’re trying to do is keep it in a proper forum. . . . What we’re fighting for is the ability of airlines to handle this issue between management and . . . employees."\textsuperscript{62} Others echo the ATA/United objection to government intervention in the employer-employee relationship. For instance, "Will Perkins, chairman of the group Colorado

\textsuperscript{55} See Seelye, supra note 54, at A18. The amendment was supported by 189 Republicans and 25 Democrats and opposed by 33 Republicans, 178 Democrats, and 1 Independent. See id.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} ASSOCIATED PRESS, supra note 49.

\textsuperscript{59} See, e.g., id. (noting that conservatives in 1998 coordinated a national campaign against homosexuals in an effort to increase conservative voter turn-out); Carolyn Lochhead, GOP Takes Aim at S.F.’s Partners Law, S.F. CHRON., July 18, 1998, at A1 (calling the amendment "another GOP strike at the gay movement" and noting that Senate Majority Leader Trent Lott (R-Miss.) recently compared homosexuals to alcoholics and kleptomaniacs and refused to schedule a vote on the nomination of gay businessman James Hormel as ambassador to Luxembourg).

\textsuperscript{60} For analysis of the policy arguments in favor of domestic partnership benefits, see Horne, supra note 3, at 38 (noting that extending domestic partner benefits promotes "the social, emotional, and economic stability of the partners individually and of the families created by the partners. The larger society will benefit from these improvements in many ways. For example, partners in stable relationships will be more productive, more involved in their community, and less likely to be dependent on social programs.").

\textsuperscript{61} Lewis, supra note 41, at A1 (quoting United spokesperson Sue Thurman).

\textsuperscript{62} Gordon, supra note 39, at A15 (quoting ATA spokesperson David Fuscus).
for Family Values, opposes the extension of health benefits to same-sex partners of employees. . . . [H]is real objection is to being "forced by the government" to institute domestic-partner benefits.\textsuperscript{63}

Some opponents of the Ordinance proffer moral arguments against legitimizing homosexual relationships. Such rhetoric was a particularly strong factor in the suit brought by the ACLJ, as well as the Riggs amendment. The ACLJ calls the Ordinance a threat "to our religious liberties and freedoms."\textsuperscript{64} The group's challenge was based on a claim that domestic partnership benefits undermine traditional marriage. The group's Western Regional Counsel, Benn Bull, describes the Ordinance as "a dagger aimed at the heart of traditional marriage."\textsuperscript{65} The ACLJ's claim that the Ordinance undermines traditional marriage is nothing new. Lesbian and gay rights supporters for years have fought the argument that the official recognition of homosexual relationships would somehow detract from heterosexual ones. The Ordinance was in fact passed in large part as a remedy to the sort of homophobia that the ACLJ promotes.

On the other hand, United has always said that it is not fighting the Ordinance because it objects to lesbian and gay rights.\textsuperscript{66} United claims that it has "zero-tolerance" for "harassment and discrimination in any form—whether verbal, visual, physical or otherwise. It is United's express policy to forbid harassment and discrimination based on race, color, sex, age, religion, national origin, disability, veteran status or sexual orientation."\textsuperscript{67} The airline further states that it "maintains a strong commitment to diversity" and adds that given the diversity of its clientele, "we value diversity not only because it's the right thing to do, but because it's the right business thing to do."\textsuperscript{68} In its defense, the airline also points out that it donates money to lesbian and gay organizations and offers bereavement benefits to the same-sex domestic partners of employees.\textsuperscript{69} And in support of its claim that it is motivated by factors other than having to give domestic partnership benefits, United has continued with the suit even after making a permanent policy change in favor of offering the benefits.

\textsuperscript{63} Leib, \textit{supra} note 6, at Bus. 1.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} For example, United Chairman and CEO James Goodwin claims that the lawsuit "has never been about gay and lesbian rights." \textit{Rising to the Occasion}, ADVOC., Aug. 31, 1999, at 12.


\textsuperscript{68} United Airlines, \textit{supra} note 67.

\textsuperscript{69} \textit{See} Lewis, \textit{supra} note 41, at A1.
Whether United admits it, however, it did choose a side in the moral debate by fighting so hard against a groundbreaking domestic partnership law. According to David Tomb, founder of the gay and lesbian employees organization called "United at United," United is "really missing the mark on gay and lesbian issues... I think there is still a level of homophobia. It disappoints me to think that, but that is what comes to mind."\textsuperscript{70} San Francisco Supervisor Leslie Katz called United's argument "disingenuous" and found that it "rings hollow."\textsuperscript{71} Before the court forced United to offer some benefits, Katz added that if United were truly committed to fairness, it would "go ahead and do it, provide the benefits. They could have done it before the ordinance was enacted."\textsuperscript{72}

Financial cost may have been another factor in United's fight against the Ordinance. As San Francisco Chief Assistant City Attorney Dennis Aftergut points out, "for 20 years, the airlines did not make a peep about being subjected to our nondiscrimination law. Only when we included equal benefits did United start claiming that it can't be subjected to local laws."\textsuperscript{73} However, if cost is a factor for United, its reasoning is questionable. As discussed in Part I, extending domestic partnership benefits to same-sex couples usually costs relatively little. Furthermore, leading gay rights organizations called for a boycott of the airline,\textsuperscript{74} and the airline's lawsuit has received substantial publicity. United antagonized homosexual consumers at its own peril, given that statistically gays and lesbians tend to be more loyal consumers than heterosexuals;\textsuperscript{75} lesbians and gays also tend to have greater disposable income and travel more than heterosexuals.\textsuperscript{76}

\textsuperscript{70} Schodolski, supra note 5, at Bus. 1.
\textsuperscript{71} Lewis, supra note 41, at A1.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{75} See Abby R. Spiro, A Forgotten Market?, TRAVEL AGENT, Sept. 28, 1998, at 143 (quoting travel professional Vicki Skinner saying, "No one is more loyal than a gay client, but no one will destroy you more than a gay client").
\textsuperscript{76} See id.
IV. **Restricting the Scope of the Ordinance: The District Court Decision**

A. **The Dormant Commerce Clause**

In *Air Transport I*, the decision of the California District Court in the lawsuit filed by the ATA on behalf of United and other airlines operating in San Francisco, the court limited the scope of the Ordinance on grounds of conflict with the Constitution's dormant Commerce Clause. The court declared:

The Commerce Clause of the United States Constitution... empowers Congress to "regulate Commerce with foreign Nations, and among the several States." The Supreme Court has interpreted the clause not only to grant legislative power to Congress but also impliedly to limit the power of State and local governments to enact laws affecting foreign and interstate commerce. The implied limitation on State and local powers is referred to as the dormant Commerce Clause.

When a state statute is found to directly regulate interstate commerce, courts generally strike it down "without further inquiry." The court added that "[t]he principles guiding this assessment... reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres."

The court concluded that the Ordinance violated the limitations on extraterritorial regulation imposed by the dormant Commerce Clause. Once a company signs a contract with the City (or seeks to make a contract with the City), it must offer domestic partnership benefits to all of its employees in the United States or face the penalties imposed by the City. The court determined that these penalties "effectively regulate[]" extraterritorial activities and added that "[u]nless shielded by the market participant exception to the dormant Commerce Clause, the Ordinance is unconstitutional as applied to out-of-State conduct."

77. See Air Trans. Ass'n v. City & County of San Francisco, 992 F. Supp. 1149, 1161 (N.D. Cal. 1998).
78. U.S. Const. art. I, § 8, cl. 3.
80. *Id.* (citing Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986)).
81. *Id.* at 1161-62 (citing Healy v. Beer Inst., 491 U.S. 324, 335 (1989)).
82. *See id.* at 1162.
83. *See id.*
84. *Id.*
The court also found that the marketplace exception to the dormant Commerce Clause does not shield the Ordinance. The marketplace exception allows a State, in the absence of congressional action, to participate in the market and exercise “the right to favor its own citizens over others.” The Supreme Court has defined the limits of the exception:

The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.

The district court maintained that by “purchasing services or leasing property,” the City clearly acted as a market participant when it implemented the Ordinance. Therefore, “[t]he only question before the Court... is whether, by implementing the Ordinance, the City inappropriately reaches beyond the sphere of economic activity in which it is participating in an attempt to regulate commerce beyond its borders.” The court decided that the City had reached beyond these borders when it sought to regulate the benefits of out-of-state employees through the threat of penalties. These out-of-state employees can “hardly be described, even informally, as ‘working for the city.’” The court consequently struck “down the Ordinance insofar as it applies to the out-of-state conduct.”

However, the court found that the Ordinance as applied to conduct within the state does not place undue burdens on interstate commerce. The Supreme Court has ruled that a State may “burden interstate transactions... incidentally” but may not “affirmatively discriminate against such transactions.” The court determined that it would uphold the Ordinance if it sought “even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce [were] only incidental.” Alternatively, the court said that it would strike down a measure that imposed a burden on interstate commerce that was “clearly

85. See id. at 1163.
86. Id. at 1162 (citing Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976)).
87. Id. at 1163 (citing South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984)).
88. Id.
89. Id.
90. See id.
91. Id. (citing White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 211 n.7 (1983)).
92. Id. at 1164.
93. See id.
94. Id. (citing Maine v. Taylor, 477 U.S. 131, 138 (1986)).
95. Id. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
excessive in relation to the putative local benefits." 96

The court did find that the City had enacted the Ordinance in an effort to promote a legitimate public policy interest—that of discouraging "discriminatory business practices." 97 The court analogized the Ordinance to two cases in which courts had found legitimate public policy interests in the choices of local governments to fight discrimination by refusing to employ companies that promoted racial discrimination and apartheid. 98 Likewise, San Francisco's previous efforts to fight discrimination on the basis of sexual orientation have been upheld. 99 "[T]hus, the Ordinance effectuates a legitimate local public interest, to combat discrimination on the basis of sexual orientation." 100

Since the City's interests are legitimate, the Ordinance fails "only if the burdens it places on interstate commerce are clearly excessive in relation to the putative local benefits." 101 The court found that any burden on interstate commerce did not outweigh the public interest served by the Ordinance. 102 Those who had been discriminated against by a denial of domestic partnership benefits were "victims," while the burden of modifying discriminatory benefit plans was "minor," especially given the fact that employers can comply with the Ordinance without an increase in their benefits costs by reducing or eliminating benefits for spouses of heterosexual employees. 103 In short, insofar as the Ordinance does not violate the dormant Commerce Clause's prohibition of extraterritorial regulation, it does not place an excessive burden on interstate commerce.

B. ERISA

The court also found that the Ordinance was substantially preempted by the Employee Retirement Income Security Act ("ERISA"). 104 "ERISA

96. Id. at 1165.
97. Id.
98. See id. at 1164 (discussing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989); Board of Trustees v. Mayor of Baltimore, 562 A.2d 720 (Md. 1989)).
99. San Francisco has a long history of taking a principled stand against discrimination and of being in the forefront of efforts to ban discrimination based on sexual orientation. See, e.g., Alioto's Fish Co. v. Human Rights Comm'n, 174 Cal. Rptr. 763, 766 n.4 (Ct. App. 1981) (noting that since 1972, the City has prohibited contractors from discriminating on the basis of sexual orientation).
100. Air Transport I, 992 F. Supp. at 1164.
101. Id. at 1165.
102. See id.
103. See id.
104. See 29 U.S.C. §§ 1001-1461 (1994). This case is not the first time that ERISA preemption has limited the scope of gay rights legislation. In Seattle, the Human Rights Department determined that denial of coverage to domestic partners by private employers "might violate city laws prohibiting discrimination on the basis of marital status." Horne,
contains an express preemption clause providing that the law ‘shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan’ as described in the act." \(^{105}\) The rationale of the ERISA preemption clause is to:

create a unified federal law so as to avoid subjecting multi-state employers to inconsistent court rulings. Thus, state and local law prohibiting discrimination on the basis of sexual orientation and/or marital status is useless in challenging a benefits denial. While ERISA prohibits discrimination in eligibility determinations to the same extent as federal law generally, sexual orientation and marital status are not now included among federal statutes making discrimination unlawful. \(^{106}\)

The court acknowledged that the scope of ERISA preemption has been in a state of flux in recent years. \(^{107}\) In *Shaw v. Delta Air Lines, Inc.*, \(^{108}\) the Supreme Court broadly construed ERISA’s “relate to” preemption provision. \(^{109}\) Invalidating a New York law that required employers to pay pregnant employees benefits, the Court stated that a “law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.” \(^{110}\) However, in a subsequent decision the Supreme Court observed that “there must be some limit to ERISA preemption, but... neither the language of the provision nor the Court’s prior decisions interpreting that language provided much guidance as to where to draw the line.” \(^{111}\) Rather than looking to the “unhelpful text

\supra\ note 3, at 50. As a result of the potential ERISA conflict, the holding was “subsequently limited to municipal employees.” *Id.*


109. *See id.* at 98.

110. *Id.* at 96-97.

and the frustrating difficulty of defining its key term, [courts must] look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive."\(^\text{112}\)

After looking to Congress’ intent in passing ERISA and applying the “connection to” test, the\(^\text{113}\) Air Transport I court determined that large portions of the Ordinance were preempted by ERISA. The court indicated that though the City was motivated by a “laudable” goal of combating discrimination,\(^\text{114}\) the Ordinance requires “City contractors to modify employee benefit plans that discriminate between employees with spouses and employees with domestic partners. This... directly interferes with ERISA’s goal of shielding employee benefit plans from inconsistent State and local regulation.”\(^\text{115}\)

The court also found that the Ordinance’s provisions for non-ERISA benefits were not preempted because there was no substantial connection between these benefits and ERISA.\(^\text{116}\) The court stated that “[i]n the extent the Ordinance is applied to benefits that... require no ‘ongoing administrative program,’ the Ordinance does not apply to a ‘plan’ and thus is not preempted.”\(^\text{117}\) The court also noted, however, that many benefits covered by the Ordinance “require procedures for determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records,” and thus amount to a plan and are subject to preemption.\(^\text{118}\)

In short, non-ERISA benefits “such as moving expenses, memberships and membership discounts and travel benefits, are not governed by ERISA at all,” and thus are not preempted.\(^\text{119}\) Also, ERISA-covered benefits that are not offered through an ERISA plan, such as family medical and bereavement leave, are not preempted.\(^\text{120}\) However, benefits that are covered by ERISA and are offered through an ERISA plan are preempted—including health insurance, pension benefits, and family

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112. New York State Conference of Blue Cross & Blue Shield Plans, 514 U.S. at 656.
113. 992 F. Supp. at 1176.
114. See id.
115. Id.
116. See id. at 1169.
117. Id. The court added that non-ERISA benefits are not preempted even if they are administered through an ERISA plan. See id. at 1174; see also Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 7-8 (1987).
118. Air Transport I, 992 F. Supp. at 1169 (citations omitted). The San Francisco Human Rights Commission’s regulations implementing the Ordinance define “benefits as any plan, program or policy provided by a City Contractor to its employees as part of the employer’s total compensation package.” Id. (citations omitted) (emphasis added).
119. Id. at 1175.
120. See id. at 1180.
medical and bereavement leave.\textsuperscript{121}

The City argued that the Ordinance did "not ‘mandate employee benefit structures’ because employers can purchase separate insurance coverage for their employees’ domestic partners (‘stand-alone plans’), which would not be ERISA plans."\textsuperscript{122} The court rejected this argument for two reasons. First, the court was not persuaded by the City’s claim that "if employers purchase separate health insurance policies for their employees’ domestic partners, those policies would not be part of an ERISA plan"\textsuperscript{123} because the domestic partners would not fit the ERISA definitions of a plan “participant” or “participants’ beneficiaries.”\textsuperscript{124} The court found that this reading of the statute was “unnatural” and that the City’s interpretation was contrary to the purposes of the statute.\textsuperscript{125} Second, the court determined that even if a stand-alone plan were not an ERISA plan, ERISA still would preempt it because a stand-alone plan is classified by comparison to an ERISA plan.\textsuperscript{126}

Finally, concerning the dormant Commerce Clause, the City maintained that because of a marketplace participant exception ERISA should not preempt the Ordinance.\textsuperscript{127} Citing the recent narrowing of the scope of ERISA preemption, the court recognized the possibility of a narrow marketplace participant exception.\textsuperscript{128} However, this exemption only applies when a state is acting as a proprietor, not as a regulator.\textsuperscript{129} When a state imposes conditions on contracts to ensure a high quality work product, it is acting as a proprietor.\textsuperscript{130} Though the City said that its primary motivation in passing the Ordinance was to attract the highest quality workforce possible,\textsuperscript{131} the court disagreed, holding that the City had acted in an effort to regulate employers’ employee benefit practices.\textsuperscript{132} When a state acts to induce a contractor to stop discriminating in the provision of

\begin{itemize}
  \item \textsuperscript{121} See id.
  \item \textsuperscript{122} Id. at 1169.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id. at 1170-71
  \item \textsuperscript{125} See id. at 1171.
  \item \textsuperscript{126} See id. at 1172-73.
  \item \textsuperscript{127} See id. at 1178.
  \item \textsuperscript{128} See id. The Ninth Circuit had twice held that there is no marketplace participant exception to ERISA preemption. See id. However, the Air Transport I court did not feel bound by these precedents because of the Supreme Court’s narrowing of the ERISA preemption clause in subsequent decisions. See id.
  \item \textsuperscript{129} See id.
  \item \textsuperscript{130} See id.
  \item \textsuperscript{131} See id. at 1179.
  \item \textsuperscript{132} See id. “The connection between eliminating domestic partner discrimination in employee benefit plans and the quality of services provided by the contractor is too tenuous and remote to explain the City’s enactment of the ordinance. In any case, this rationale would only exempt the ordinance to the extent it is applied to work performed directly for the City.” Id.
\end{itemize}
employee benefits, it is acting as a regulator. In recognizing the existence of a narrow marketplace participation exception, the court noted that in passing ERISA, Congress did not intend to prohibit states from using contracts to make statements of political expression to the extent that these actions do not have "practical economic impact on the employer that is either different from that of the ordinary consumer or is otherwise governmental in nature." The court concluded that ERISA would not preempt regulations in instances "where the City wields no more power than an ordinary consumer in its contracting relationships." Therefore, this exception does not apply to the Air Transport I case as the City clearly wields more power than an ordinary consumer due to its monopoly in the leasing of airport space.

C. The Airline Deregulation Act

The court, for the most part, rejected an argument that the Airline Deregulation Act ("ADA") preempted the Ordinance. The ADA provides that State and local authorities 'may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service' of an airline." However, the court went on to state, "Exempted from this preemption provision, however, are State or local governments that own or operate airports when they are 'carrying out [their] proprietary powers and rights.'"

The court employed a similar analysis to determine whether a provision "relates to" the ADA as it used with ERISA—a substantial connection test. The court determined that the Ordinance did not relate to price or services closely enough to warrant preemption. The court noted, however, that while the Ordinance does not specifically refer to airline routes, the possibility of a substantial connection existed. The substantial connection

133. See id.
134. Id.
135. Id. at 1179-80 (quoting Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1416 (9th Cir. 1996) (upholding a city's boycott of a newspaper in advertising and subscriptions as a protest of that newspaper's labor practices)).
136. Id. at 1180.
137. See id.
138. See id. at 1181-88.
139. Id. at 1181 (quoting 49 U.S.C. § 41713(b)(1) (1994)).
140. Id. at 1181 (citation omitted).
141. See id. at 1182-88.
142. See id. at 1183-87.
143. See id. at 1187.
would occur... only if the City applies the Ordinance to leases or other contracts that are essential to a carrier's operations at the Airport... By raising barriers to a carrier's use of a particular airport, the Ordinance would interfere with the potential for full market competition between carriers on as many routes as possible. To the extent the Ordinance has this effect, therefore, it is preempted by the ADA.\footnote{Id.}

The court added that such interference would exist only when the burden of complying with the Ordinance was so great as to coerce airlines into changing their routes.\footnote{See id.} The court later ruled that the Plaintiffs' argument fell "far short" of proving that carriers would alter their routes due to the Ordinance.\footnote{See id.}

\textit{D. The Railway Labor Act}

In determining that the Railway Labor Act ("RLA"), the federal law governing labor relations in the airline industry, did not preempt the Ordinance, the court rejected several arguments made by Plaintiffs.\footnote{See Air Trans. Ass’n of America v. City & County of San Francisco, 1999 U.S. Dist. LEXIS 8747, No. C97-07163CW, at *26-27 (N.D. Cal. May 27, 1999).} First, the Plaintiffs claimed that the RLA preempts the Ordinance because enforcing the Ordinance would require interpreting the air carriers' collective bargaining agreements.\footnote{See Air Transport I, 992 F. Supp. at 1189-90.} The RLA preempts state causes of action to enforce collective bargaining agreements but not actions to enforce rights independent of collective bargaining agreements.\footnote{See id. at 1189.} Though a court may consult a collective bargaining agreement to determine whether spouses and domestic partners are receiving equal benefits, the source of the right to equal benefits is independent of the collective bargaining agreement.\footnote{See id.} Therefore, the RLA does not preempt the Ordinance on that basis.\footnote{See id.}

Second, the court rejected Plaintiffs' argument that "the Ordinance is preempted because it imposes obligations that are inconsistent with the terms of the air carriers' collective bargaining agreements."\footnote{Id.} The court indicated that accepting this argument would permit employers and employees to agree to "exempt themselves from State law."\footnote{Id.}
Third, the court found that the Ordinance did not alter the balance between employers and unions in collective bargaining. "States generally may not take actions that alter the balance of power between labor and management in areas deliberately left unregulated by Congress." However, the "effect of the Ordinance is to bar the City from contracting with employers who discriminate," regardless of whether the employees are unionized. The Ordinance was not enacted in an "attempt to alter the balance of power between labor and management in the federally-governed collective bargaining process." Rather, the Ordinance was intended to provide "specific minimum protections to individual workers," a permissible goal under the RLA.

Finally, the court rejected Plaintiffs' argument that the Ordinance dictates how unions and employers must negotiate collective bargaining agreements, or alternatively, that the Ordinance requires employers to make unilateral changes in employment contracts, thereby violating federal labor law. If employers do not wish to unilaterally provide the benefits, regulations permit contractors a temporary waiver from the Ordinance while they negotiate with employees. "Because the City cannot authorize conduct that is prohibited by federal labor law, the Court interprets the HRC regulations to condition a temporary waiver on unilateral action by a union employer only when that unilateral action is not arguably prohibited by federal labor law."

154. See id. at 1189-90.
155. Id.
156. Id. at 1190.
157. Id.
158. Id. (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985)).
159. See id. "In most circumstances, federal labor law prohibits employers from making unilateral changes in the terms and conditions of employment, even if the changes are favorable to the employees." Id. at 1191 (citations omitted).
160. See id. at 1190. The Ordinance's regulations temporarily suspend the Ordinance's nondiscrimination requirements for city contractors with collective bargaining agreements under certain conditions.

Such contractors are not deemed to be discriminating in the provision of benefits 1) if a collective bargaining agreement governing the provision of benefits is in effect at the time of the first award of a city contract to the contractor following the effective date of the Ordinance, 2) if the contractor takes all reasonable measures to end any discrimination in benefit programs, by taking unilateral action or by asking the unions to reopen the union contract to negotiate a nondiscriminatory benefits package, and 3) if the contractor provides a cash equivalent to eligible employees in the event the contractor's reasonable efforts to eliminate the discrimination are unsuccessful.

Id. (citation omitted).
161. Id. at 1191.
E. Summary of the Court's Decision

The court's decision has a substantial limiting effect on the Ordinance. The court invalidated the Ordinance's requirement that employees based outside of San Francisco must receive equal domestic partnership benefits. Additionally, federal law preempts the Ordinance insofar as it applies to ERISA benefits that are administered through ERISA plans. The ADA, however, will not preempt the Ordinance, unless the burden of complying with the otherwise valid portions of the Ordinance is so onerous that air carriers practically would be forced to stop using the San Francisco Airport. Finally, the Ordinance is not preempted by the RLA. Thus, the main benefit left intact by the court's decision is that non-ERISA benefits may not be discriminatorily provided to workers based in San Francisco.162

V. Is the San Francisco Approach to Securing Domestic Partnership Benefits More Effective Than Past Approaches?

A. Court-Based Approaches to Obtaining Domestic Partnership Benefits

Plaintiffs seeking domestic partnership benefits might invoke a city's or state's nondiscrimination ordinance to argue that the denial of domestic partnership benefits is illegal and violates these laws. These arguments, however, have not been successful in the past, as state courts have generally "deferred to state legislatures [in matters of employee compensation] and directed non-married employees claiming discrimination and unjust compensation to petition for statutory reform."6

Plaintiffs might also argue that withholding domestic partnership benefits from homosexual couples is a violation of the equal protection clauses included in both the federal and state constitutions. While no Supreme Court case discusses the subject of same-sex domestic partnership benefits, lower courts have generally not used an equal protection analysis to mandate nondiscrimination in employment-linked benefits. In many cases that go to trial, the same-sex couple asserts that this denial of benefits

162. Both sides claimed victory following the court's decision. City Attorney Louise Renne said, "This is a very historic decision. . . . This is the first major decision upholding a domestic partners ordinance." Edward Epstein, Judge's Ruling Affirms Domestic Partner Law in S.F., S.F. CHRON., Apr. 11, 1998, at A11. San Francisco Supervisor Tom Ammiano said, "I am happy as a pig in a poke. The law was left standing." Id. But Plaintiffs' attorney Brendan Dolan of the law firm of Brobeck, Phleger & Harrison said, "[w]e view this as a complete victory for what we set out to do." Id. ATA spokesperson David Fuscus said, "[t]he ruling represents an embarrassing day" for San Francisco. Id.

is discriminatory on the basis of sexual orientation or marital status. To date, courts have been disinclined to agree with these arguments. Thus, at present, the Ordinance is a more effective strategy for obtaining benefits than an equal protection approach.

A few courts have begun to invalidate other discriminatory measures on the grounds of equal protection clause violations. The Supreme Court in Romer v. Evans\textsuperscript{166} required at least a rational basis for a classification on the basis of sexual orientation.\textsuperscript{166} This holding suggests that sexual orientation may eventually be elevated to a higher level of scrutiny by the Supreme Court.

Reliance on a state constitution's equal protection clause was crucial to the holding in Baehr v. Lewin\textsuperscript{167} recognizing gay marriages.\textsuperscript{168} In that case, the court held that the Hawaii constitution's equal protection clause is not a "mirror image" of the Fourteenth Amendment and requires a strict level of scrutiny for statutes dealing with sexual orientation.\textsuperscript{169} Though constitutional arguments have thus far been generally unsuccessful in the domestic partnership benefits context, they are beginning to win success in other areas of lesbian and gay rights; when they are successful their impact can be tremendous.\textsuperscript{170}

B. State and Local Legislative Approaches

One author has described the different methods by which a state legislature may provide domestic partnership benefits as "carrot" or "stick" approaches.\textsuperscript{171} "A 'carrot' approach works by encouraging the private sector to change its policy in order to receive a reward."\textsuperscript{172} An example of such a policy is a tax incentive for employers that provide benefits to domestic partners.\textsuperscript{173} In contrast,

\textsuperscript{165} 517 U.S. 620 (1996).
\textsuperscript{166} See id. at 631-32.
\textsuperscript{167} 852 P.2d 44 (Haw. 1993).
\textsuperscript{168} See id. at 66.
\textsuperscript{169} See id. at 59-68.
\textsuperscript{170} In recent years, courts have ranged from very gay-friendly as in Baehr at 44, to very homophobic as in Bowers v. Hardwick, 478 U.S. 186 (1986). The court in Air Transport I was actually rather gay-friendly, calling the San Francisco Ordinance's policy goals "laudable." Air Transp. Ass'n v. City of San Francisco, 992 F. Supp. 1149, 1176 (N.D. Cal. 1998). Other cities and states taking legislative action may face judges who are less receptive to arguments in support of lesbian and gay rights.
\textsuperscript{171} Horne, supra note 3, at 49.
\textsuperscript{172} Id.
\textsuperscript{173} See id.
“Stick” policies are designed to encourage the private sector to change its policy to avoid a punishment. “Stick” policies are probably less desirable than “carrot” policies in today’s political climate for two reasons: (1) they will likely be viewed more negatively by voters and industry, and (2) they may create a conflict between the three levels of government regulations.\(^{174}\)

The San Francisco Ordinance may be viewed as a “stick” approach because it penalizes companies that do not extend domestic partnership benefits by denying them the opportunity to do business with the City. Alternatively, the San Francisco Ordinance may be viewed as a “carrot” approach because it rewards companies by granting them an advantage in securing potential contracts if they provide domestic partnership benefits. The notion that the City is using a “stick” approach has resulted in a negative reception by some companies and rulings by some courts that the Ordinance is in conflict with federal laws.

The recent battle over legalization of same-sex marriage in Hawaii reveals other crucial state legislative issues. A constitutional amendment outlawing gay marriage passed the Hawaii legislature\(^{175}\) and was ratified by state voters in 1998.\(^{176}\) In spite of this setback, Hawaii has passed legislation recognizing domestic partnership on a state level.\(^{177}\) The Hawaii experience thus shows the potential for both great successes and setbacks at a state legislative level. Due to its broader application, a comprehensive state law is usually preferable to a local law. Where a legislature is unwilling to pass a state law, however, a local law may be a more realistic alternative. Both state and local laws face the problem of federal preemption.

C. A Federal Legislative Approach

Working to change federal laws is potentially an effective means of winning domestic partnership benefits. An amendment to ERISA requiring equality in domestic partnership benefits would be ideal. Congress is unlikely to pass such an amendment at present, however, as the federal government has consistently extended benefits to married couples while denying them to domestic partners; these benefits include “preferential tax treatment, federal employee benefits, military personnel benefits, social

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174. Id. at 49-50.
175. See ACLJ, supra note 46.
177. See Boxall, supra note 12.
security benefits, spousal citizenship, and entitlement benefits.\textsuperscript{178} The federal government denies these benefits to domestic partners because it "usually does not recognize any partnerships absent marriage" and "many federal benefits, including income tax and social security benefits, rely on state definitions of 'spouse' to determine the eligibility of a partner."\textsuperscript{179}

The recently passed so-called Defense of Marriage Act ("DOMA") is a further step backwards. In DOMA, Congress defines marriage as a relationship between "one man and one woman"\textsuperscript{180} and denies federal benefits to same-sex spouses even if their marriage is recognized by a state.\textsuperscript{181} The fact that DOMA was passed by a very large margin does not bode well for future efforts to extend federal recognition to gay and lesbian relationships. Finally, the Riggs amendment\textsuperscript{182} is evidence of congressional hostility toward efforts to extend domestic partnership benefits.

In spite of general federal refusal to recognize gay and lesbian relationships, Congress has come close to enacting a measure that would greatly strengthen gay and lesbian employment rights. The Employment Nondiscrimination Act ("ENDA") "would amend Title VII of the 1964 Civil Rights Act by adding sexual orientation as a prohibited basis for discrimination to the current categories of race, religion, gender, and national origin."\textsuperscript{183} A similar bill fell one vote shy of passage in the Senate in 1996.\textsuperscript{184} Passage of ENDA, however, would not override ERISA's preemption of the San Francisco Ordinance because ENDA specifically provides, "[t]his Act does not apply to the provision of employee benefits to an individual for the benefit of his or her partner."\textsuperscript{185}

\textbf{D. Company by Company Approach}

Employees who work for companies that do not provide domestic partnership benefits may find that the most immediate way to secure benefits is to approach management of their company directly.\textsuperscript{186} Gay and lesbian employees may approach employers individually, form an organization for gay and lesbian employees, or convince their unions to

\textsuperscript{178} Horne, supra note 3, at 41.
\textsuperscript{179} Id.
\textsuperscript{182} See discussion supra Part III.
\textsuperscript{184} See id.; see also Winnie Stachelberg, \textit{Position of Strength: ENDA Reintroduced with More Cosponsors}, Momentum, HUM. RTS. CAMPAIGN Q., Summer 1997, at 12, 12.
\textsuperscript{185} Leonard, supra note 106, at 951 n.116.
\textsuperscript{186} See Hargrove, supra note 1, at 52-53, for an account of how to get an employer to offer domestic partnership benefits.
seek domestic partnership benefits through the collective bargaining process. The fact that many corporations have extended domestic partnership benefits in recent years demonstrates that approaching management may be an effective means of securing benefits. This approach, however, is not a comprehensive solution to the problem, and many companies are likely to refuse to give the benefits unless they are compelled to do so by law. Ordinances based on the San Francisco model are an effective way of spurring reluctant companies to offer at least some domestic partnership benefits.

VI. CONCLUSION

A comparison of the San Francisco Ordinance with other approaches reveals that, even as originally drafted, the Ordinance is clearly not a comprehensive means of securing domestic partnership benefits for all employees. The Ordinance targets only those companies that seek to enter into contracts with local government. In addition, employers have the option of complying with the measure by denying benefits to married couples, rather than by offering them to domestic partners. Finally, the Ordinance does not require that the benefits be consistent from employer to employer.

After the decision in Air Transport I, the effectiveness of the Ordinance is further compromised—the Ordinance applies only to local employees and only includes non-ERISA benefits. Important categories of benefits such as health insurance and pensions are now usually beyond the reach of ordinances patterned after San Francisco’s. Equally disappointing is the fact that the Ordinance will no longer compel the extension of benefits to workers who live outside of San Francisco. Clearly, only national legislation or recognition by the Supreme Court that classifications based on sexual orientation should be subject to strict scrutiny will lead to full equality in domestic partnership benefits for all U.S. workers.

While ordinances similar to San Francisco’s are by no means comprehensive solutions, they remain an effective strategy for winning benefits. First, lawmakers who support such ordinances can immediately secure non-ERISA benefits for some workers in their cities without waiting for action by courts or legislatures. Further, many employers may decide, as United did, to offer ERISA benefits after being compelled to

187. See Boxall, supra note 12.
188. See discussion supra Part IV.
189. Already, “[o]fficials in other cities, such as Portland, Seattle, New York and San Diego, have expressed interest in adopting their own versions of the law.” Gordon, supra note 39, at A15.
offer non-ERISA ones. And though the Ordinance no longer compels employers to offer benefits to workers outside of San Francisco, some predict that employers will find it difficult to offer benefits to workers in San Francisco but not to workers in other parts of the country.\footnote{190. See, e.g., Epstein, supra note 162, at A11. Indeed, United intends to offer domestic partnership benefits to all of its employees worldwide. See United Airlines Press Release, United Airlines Becomes First U.S. Airline to Offer Partner Benefits Package to Employees, Retirees Worldwide <http://www.ual.com/admin/Press_View_Detail.asp?rec_nbr=538> (visited Sep. 18, 1999).


Early signs, even following limitation of the Ordinance by the Air Transport I & II decisions, are encouraging. Unlike United, hundreds of companies have quietly complied with the Ordinance: in 1998, for example, 882 of the 964 employers nationwide that began offering domestic partnership benefits did so as a result of the Ordinance.\footnote{Also encouraging is evidence of a "domino effect" within industries once one major company begins to offer benefits. For example, U.S. Airways and American Airlines also began to offer domestic partnership benefits within days of United's decision.\footnote{192. See Three Major U.S. Airlines to Offer Same-Sex Benefits, 14 Airline Financial News, Aug. 16, 1999, at 32; see also Deb Price, Domestic Partner Benefits Become Norm, Detroit News, Aug. 16, 1999, at A9.}} Also encouraging is evidence of a "domino effect" within industries once one major company begins to offer benefits. For example, U.S. Airways and American Airlines also began to offer domestic partnership benefits within days of United's decision.\footnote{192. See Three Major U.S. Airlines to Offer Same-Sex Benefits, 14 Airline Financial News, Aug. 16, 1999, at 32; see also Deb Price, Domestic Partner Benefits Become Norm, Detroit News, Aug. 16, 1999, at A9.}

The United Airlines experience and the high number of employers now offering domestic partnership benefits as a result of the Ordinance show that other city ordinances modeled on San Francisco's could indeed be a highly effective, realistic strategy for securing domestic partnership benefits for many workers. Other cities contemplating passing similar ordinances may want to consider a scaled down, non-ERISA version of San Francisco's law to discourage court challenges. Even non-ERISA benefits laws can immediately secure important benefits for workers, and, more importantly, lead to broader domestic partnership benefits by changing employer attitudes and industry climates.