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Client Alert

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Bloomberg Administration Challenges NYC Equal Benefits Law

Earlier this year the New York City Council, over the veto of Mayor Bloomberg, passed the Equal Benefits Law, which as discussed below, requires certain companies that have contracts with the City of New York to provide equal benefits to employees' domestic partners. Although the Law became effective on October 26, 2004, the Bloomberg administration has filed a lawsuit challenging the legality of the statute, and has declined to enforce the Law pending resolution of its legal challenge. Although the City Council, in a separate lawsuit that it filed, recently obtained a judgment requiring the Mayor to enforce the Law, that judgment is being stayed while the Mayor challenges the court's order. Thus, at the present time, the requirements of the Equal Benefits Law are not being enforced by the City of New York.

The Requirements of The Equal Benefits Law

The Equal Benefits Law requires that companies provide equal benefits to employees' domestic partners if those companies have contracts with New York City for $100,000 or more (or if a new contract is awarded and an aggregate of all contracts awarded by the City in the past 12 months exceeds $100,000.) *Title 6 of the Administrative Code of the City of New York*, § 6-126 (b)(4). The Law defines "contracts" broadly, and includes agreements for "real property, work, labor, services, supplies, equipment, materials, construction or construction related service or any combination of the foregoing." If a contractor is covered by the Law, it applies to all of its employees who during the term of the contract: (1) work within New York City (irrespective of whether they work on a covered contract); and (2) work outside of New York City if they work directly on a covered contract. *Id.* at §§ (b)(1), (e). The Law only affects contracts entered into or renewed on or after October 26, 2004.

Domestic partnerships covered by the Law include those that are registered in New York and the partnerships of persons who have lawfully entered into a domestic partnership, marriage or civil union recognized in another jurisdiction. Alternatively, employers may create their own registry for domestic partnerships not otherwise covered under the City's criteria as long as the employer's requirements are not more stringent than the standards provided by City law. *Id.* at § (n).

Employment benefits covered by the Law include, *but are not limited to*, the following: "health insurance, pension, retirement, disability and life insurance, family, medical, parental bereavement and other leave policies, tuition reimbursement, legal assistance, adoption assistance, dependent care insurance, moving and other relocation expenses, membership or membership discounts and travel benefits provided by a contractor to its employees." *Id.* at § (b)(7). In addition to requiring that equal benefits be provided, the Law also prohibits employers from retaliating against an employee "in the event that such employee requests equal benefits or informs the city that such contractor has failed to provide equal benefits." *Id.* at § (c)(1)(b). Failure to provide equal benefits or retaliation against an employee for requesting such benefits is deemed a material breach of the contract with the City and could result in sanctions or damages. *Id.* at § (j)

Certain employers are exempt from coverage by the Law. For example, religious organizations whose religious principles conflict with the extension of benefits to domestic partnerships can offer "household member coverage" to employees. *Id.* at § (c)(1)(a)(ii). Household member coverage is defined as coverage given to a designated member of the employee's household "provided that such household member is eighteen years of age or older, lives permanently with the employee, is unmarried, is

not a dependent of any other person and is not the tenant or landlord of the employee." *Id.* at § (b)(9).

An employer can also avoid direct compliance with the Law if it can show that, despite taking reasonable measures, it is unable to provide equal benefits. If that is the case, the employer may provide the cash equivalent of such benefits. *Id.* at § (h)(1). If the cost of equal benefits to domestic partners exceeds the cost of providing equivalent spousal benefits, an employer may require the employee to pay the excess cost of the domestic partner benefit. *Id.* at § (f). Finally, in limited circumstances, a contracting agency of the City may seek a waiver of the Law's requirements. *Id.* at § (k)(1).

With respect to compliance, employers must provide a description of their employee benefit plans to the relevant City agencies, with a certification that the employer offers equal benefits to domestic partners. Under the Law, the City must include in the contract a provision requiring the employer to comply with the statute. If an employer must take administrative action in order to provide the equal benefits which may result in significant delay, that employer may request an extension of time of up to three months in order to comply with the Law. *Id.* at § (h)(2).

The Mayor's Opposition To The Law

The New York City Corporation Counsel, on behalf of the Mayor, was initially unsuccessful in his legal challenge to prevent the Law from becoming effective on October 26, 2004, but still has a pending lawsuit challenging the statute's legality. The Mayor contends that the Law is invalid because it conflicts with and is preempted by New York State law governing municipal procurement, is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 *et seq.*, and, in addition, impermissibly curtails the Mayor's executive powers without a voter referendum. The Mayor elected to comply with New York State procurement law (which generally requires that contracts be awarded to the lowest bidder), and the New York City Charter (which does not authorize the City to exclude an entire category of responsible bidders), pending a final determination of the Law's legality. (A similar San Francisco ordinance was held invalid, in large part, because it conflicted with ERISA's objective of "permitting uniform national administration of employee benefit plans and eliminating the need to comply with conflicting State and local regulations." *Air Transport Assoc. v. City and County of San Francisco*, 992 F. Supp. 1149, 1176-77 (N.D. Cal. 1998), *aff'd on other grounds*, 266 F.3d 1064 (9th Cir. 2001)).

However, on November 8, 2004, the City Council obtained a final judgment, in a separate lawsuit that it filed, requiring the City to enforce the Law. The Mayor is appealing that decision, and, during the appeal, the order of the court is stayed. Thus, at the moment, the Law is not being enforced by the City.

Uncertainty For New York City Contractors

Until the legal proceedings are completed, New York City contractors who are covered by the Law will face a period of uncertainty. Currently, the City is not requiring contractors to provide the certifications required by the Law when awarding or renewing contracts. However, if the City is unsuccessful in its challenge, it is possible that it may be ordered to seek retroactive compliance with respect to contracts entered into since October 26, 2004, and it will be certainly ordered to enforce the Law going forward. Thus, employers who have entered or renewed contracts with New York City since October 26, 2004 (or will enter or renew such contracts) should be prepared to comply with the requirements of the Law in the event that such compliance becomes necessary. Steps toward compliance should include a review of current benefit policies and programs in order to determine whether adjustments are necessary. Employers may also need to update employee handbooks to reflect the changes required by the Law.

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